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1974-75 REPORT ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MARCH 1976

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LETTER OF TRANSMITTAL

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Washington, D.C.

To the President and the Congress of the United States:

I have the honor to transmit herewith the 1974–75 Report of the Administrative Conference of the United States.

This report covers the significant activities of the agency for the 18-month period from July 1, 1974, through December 31, 1975. Future annual reports will be on a calendar year basis.

Respectfully,

Robert A. Anthony
Chairman

COUNCIL MEMBERS

ROBERT A. ANTHONY [1]

CHAIRMAN

HAROLD R. TYLER, Jr., Vice Chairman, Deputy Attorney General.
JOHN W. BARNUM, Deputy Secretary, Department of Transportation.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission.[2]
WALTER GELLHORN, Professor of Law, Columbia University School of Law.
MARION EDWYN HARRISON, lawyer, Washington, D.C.
CARLA A. HILLS, Secretary, Department of Housing and Urban Development.[3]
HAROLD L. RUSSELL, lawyer, Atlanta, Ga.
RICHARD C. VAN DUSEN, lawyer, Detroit, Mich.
RICHARD E. WILEY, Chairman, Federal Communications Commission.
EDWIN M. ZIMMERMAN, lawyer, Washington, D.C.

FORMER MEMBERS OF THE COUNCIL
who served during the period of this report

ROBERT G. DIXON, Jr., Assistant Attorney General, Department of Justice.
LEONARD GARMENT, Vice Chairman, Counsel to the President.
RICHARD B. SMITH, lawyer, New York, N.Y.

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[1] Succeeded Antonin Scalia as Chairman on Aug. 23, 1974.
[2] Resigned effective Dec. 31, 1975.
[3] To resign upon appointment of successor.

MEMBERS OF THE CONFERENCE

The following list contains the names and affiliation of all members of the Conference (other than members of the Council) as of December 31, 1975:

ROBERT F. ADAMS, lawyer, Mobile, Ala.
CHARLES E. ALLEN, General Counsel, Federal Home Loan Bank Board.
WILLIAM H. ALLEN, lawyer, Washington, D.C.
FRANK R. BARNAKO, Chairman, Occupational Safety and Health Review Commission.
JOHN A. BUGGS, Staff Director, U.S. Commission on Civil Rights.
CLARK BYSE, professor of law, Harvard University Law School.
DONALD A. CAMPBELL, Judicial Officer, Department of Agriculture.
CHARLES L. CLAPP, Commissioner, Interstate Commerce Commission.
MANUEL COHEN, lawyer, Washington, D.C.
CALVIN J. COLLIER, Associate Director for Economics and Government, Office of Management and Budget.
JOHN J. CORCORAN, General Counsel, Veterans Administration.
LOUIS A. COX, General Counsel, U.S. Postal Service.
KENNETH CULP DAVIS, professor of law, University of Chicago Law School.
RONALD M. DIETRICH, lawyer, Washington, D.C.
ROBERT G. DIXON, Jr., professor of law, Washington University School of Law.
ROBERT ELLIOTT, General Counsel, Department of Housing and Urban Development.
JOHN HART ELY, General Counsel, Department of Transportation.
JOHN H. FANNING, Member, National Labor Relations Board.
BEN C. FISHER, lawyer, Washington, D.C.
JAMES F. FLUG, lawyer, Washington, D.C.
RONALD B. FRANKUM, lawyer, Del Mar, Calif.
WARNER W. GARDNER, lawyer, Washington, D.C.
CARL F. GOODMAN, General Counsel, U.S. Civil Service Commission.
JACK GREENBURG, lawyer, New York, N.Y.
RICHARD L. GRIFFITH, lawyer, Honolulu, Hawaii.
WOLF HABER, Assistant General Counsel, Department of the Treasury.
DANIEL T. HANSCOM, Chief Administrative Law Judge, Federal Trade Commission.
ASHTON R. HARDY, General Counsel, Federal Communications Commission.
GEOFFREY C. HAZARD, Jr., professor of law, Yale Law School.
RAGAN A. HENRY, lawyer, Philadelphia, Pa.
JOHN H. HOLLOMAN III, Commissioner, Federal Power Commission.
S. NEIL HOSENBALL, General Counsel, National Aeronautics and Space Administration.
SAMUEL C. JACKSON, lawyer, Washington, D.C.
CORNELIUS B. KENNEDY, lawyer, Washington, D.C.

WILLIAM J. KILBERG, Solicitor, Department of Labor.
EARL W. KINTNER, lawyer, Washington, D.C.
VICTOR H. KRAMER, professor of law, Georgetown University Law Center.
REX E. LEE, Assistant General Counsel, Department of Justice.
GEORGE A. LEMAISTRE, Director, Federal Deposit Insurance Corporation.
ROBERT J. LEWIS, General Counsel, Federal Trade Commission.
DAVID E. LINDGREN, Deputy Solicitor, Department of the Interior.
PHILIP A. LOOMIS, Jr., Commissioner, Securities and Exchange Commission.
K. E. MALMBORG, Assistant Legal Advisor, Department of State.
MALCOLM MASON, Chairman, Grant Appeals Board, Department of Health, Education, and Welfare.
ALFRED MEISNER, Assistant General Counsel, Department of Commerce.
RICHARD A. MERRILL, Chief Counsel, Food and Drug Administration.
IRA M. MILLSTEIN, lawyer, New York, N.Y.
ANTHONY L. MONDELLO, lawyer, Bethesda, Md.
CLARENCE MORSE, Vice Chairman, Federal Maritime Commission.
WILLIAM A. NELSON, lawyer, Miami, Fla.
CONSTANCE B. NEWMAN, Commissioner, Consumer Product Safety Commission.
LEONARD NIEDERLEHNER, Deputy General Counsel, Department of Defense.
THOMAS J. O'CONNELL, General Counsel, Board of Governors, Federal Reserve System.
OWEN OLPIN, professor of law, University of Utah Law School.
LOWELL W. PERRY, Chairman, Equal Employment Opportunity Commission.
JOHN W. PETTIT, lawyer, Washington, D.C.
RICHARD W. POGUE, lawyer, Cleveland, Ohio.
JOHN V. RAINBOLT II, Vice Chairman, Commodity Futures Trading Commission.
MARTIN F. RICHMAN, lawyer, New York, N.Y.
MARCUS A. ROWDEN, Commissioner, Nuclear Regulatory Commission.
OTIS M. SMITH, lawyer, Detroit, Mich.
PENELOPE H. THUNBERG, economist, Washington, D.C.
ROBERT L. TRACHTENBERG, Director, Bureau of Hearings and Appeals, Social Security Administration.
PETER F. TUFO, lawyer, New York, N.Y.
GERALD J. TURNER, Chief Counsel, Federal Aviation Administration.
HARRY H. VOIGT, lawyer, Washington, D.C.
JOHN P. VUKASIN, Jr., Judge of the Superior Court, Oakland, Calif.
CHARLES A. WEBB, lawyer, Washington, D.C.
JAMES E. WESNER, lawyer, Washington, D.C.
LEE R. WEST, Member, Civil Aeronautics Board.
MEADE WHITAKER, Chief Counsel, Internal Revenue Service.
JERRE S. WILLIAMS, professor of law, University of Texas Law School.
FRANK M. WOZENCRAFT, lawyer, Houston, Tex.
ROBERT H. YOUNG, lawyer, Philadelphia, Pa.
ROBERT V. ZENER, General Counsel, Environmental Protection Agency.
JOSEPH ZWERDLING, Chief Administrative Law Judge, Federal Power Commission

The following list contains the names of former members who served during the period of this report with their affiliation at the time of membership:

RICHARD S. ARNOLD, lawyer, Texarkana, Ark.
H. GREGORY AUSTIN, General Counsel, Small Business Administration.
FRANK A. BARTIMO, Assistant General Counsel, Department of Defense.
H. DALE COOK, Director, Bureau of Hearing and Appeals, Social Security Administration.
WILLIAM O. DOUB, Commissioner, Atomic Energy Commission.
BERNARD DUNAU, lawyer, Washington, D.C. (deceased).
STANLEY EBNER, General Counsel, Office of Management and Budget.
RODNEY E. EYSTER, General Counsel, Department of Transportation.
WHITNEY GILLILLAND, Commissioner, Civil Aeronautics Board.
GEORGE H. HEARN, Commissioner, Federal Maritime Commission.
PETER B. HUTT, Chief Counsel, Food and Drug Administration.
JOHN A. KNEBEL, General Counsel, Department of Agriculture.
SOL LINDENBAUM, Executive Assistant to the Attorney General, Department of Justice.
ROBERT E. MONTGOMERY, Jr., General Counsel, Federal Energy Administration.
ROBERT D. MORAN, Chairman, Occupational Safety and Health Review Commission.
JOHN N. NASSIKAS, Chairman, Federal Power Commission.
MAX D. PAGLIN, Permanent Member, Atomic Safety and Licensing Board, Nuclear Regulatory Commission.
JOHN H. POWELL, Jr., Chairman, Equal Employment Opportunity Commission.
HAROLD S. TRIMMER, General Counsel, General Services Administration.
HENRY N. WILLIAMS, Deputy General Counsel, Selective Service System.

STAFF OF THE CHAIRMAN'S OFFICE

RICHARD K. BERG
Executive Secretary

EMMETT J. GAVIN
Executive Director

DAVID B. H. MARTIN
Research Director

PHILIP J. HARTER
Senior Staff Attorney

JUNE S. KATZ
Staff Attorney

JEFFREY S. LUBBERS
Staff Attorney

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CHAIRMAN'S FOREWORD

The Administrative Conference has now completed eight years of productive activity, leaving a lasting and beneficial imprint on the workings of our government. During these years, our national discourse has increasingly given attention to the need for imposing limits and structure upon governmental action, and to the central significance of procedures and process values in the relations of citizens to their government. This concern has found expression in the widespread calls for reducing the government's role in the life of the citizen, for increasing the citizen's participation in governmental decisions, for "open government", for regulatory reform and the like. These expressions reflect the diverse aspirations, apprehensions and frustrations that arise in a complex and pluralistic society.

The quickening discussion of such things heightens the importance of building the Conference towards its full potential: It should become a preeminent national forum for addressing the procedural and systemic problems of governing in our times. The great issues of achieving fair and effective government, without compromising a dedication to individual freedoms or the values of representative government, should be the business of the Administrative Conference. I hope the Conference will always address these questions in manageable and practical terms. I hope, too, that it can make major contributions to an effective theory of governing through executive and regulatory action.

A key to building this role for the Conference may be found by recalling one of the chief expectations of its founders, that the Conference would continually accumulate ever-increasing levels of knowledge and insight about administrative procedure. The Conference will most successfully develop this collective wisdom if it identifies coherent main themes by which to organize its research and advice-giving functions. Then the parts of its work can be linked together and aggregated in a systematic way, so that new activities and deliberations can be founded on a well-knit accumulation of existing knowledge.

By their nature, such organizing themes will be general and will overlap. I expect to place priority on these: The criteria of good procedure, including particularly a sophisticated appreciation of the trade-offs arising from competing procedural values; the institutional decision

process, with emphasis on how agencies get and evaluate the information they need for making policy; the regulation of economic activity; the administration of individual benefit programs on a massive scale; and federal-state administrative relationships. Over time other themes may be added, and priorities will be reexamined.

The question of the scale of Conference research projects requires periodic attention. The Conference will continue to commission the relatively closely-focused inquiries into particular problems of administrative procedure which have been so successful in the past. Now, however, it has had experience with the conduct of a far larger scale project on procedures of the Internal Revenue Service, described in this report. In response to a statutory mandate to study the new trade regulation rulemaking processes of the Federal Trade Commission, the Conference has begun another project of similar magnitude. And it may undertake a substantial project or series of related projects on procedural aspects of regulatory reform. Each of these larger endeavors responds to weighty and timely public policy concerns. The Conference's capacity to undertake projects of such dimensions and significance must be enhanced through increased resources if it is to fulfill the role increasingly demanded of it.

The Administrative Conference has a deep well of expertise and talent in its members, its consultants, and its staff. It has many other friends and collaborators, in and out of government. Its accomplishments are numerous and large. Let us continue to build—sturdily, and for the long run.

ORGANIZATION AND OPERATION OF THE CONFERENCE

The Administrative Conference of the United States was established as a permanent independent Federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§ 571–576) and was activated by the appointment of its first Chairman in January 1968. Its purpose is to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress, and the Courts.

The statutory provisions governing the organization and operation of the Conference are set forth at the end of this report. The Conference consists of three entities—the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

The Chairman of the Administrative Conference is appointed by the President, with the advice and consent of the Senate, for a term of 5 years. He is the chief executive of the Conference and its only full-time compensated member.

The Chairman, with the approval of the Council, appoints the public members of the Conference. He presides at plenary sessions of the Assembly and at Council meetings. He is the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. He has authority to investigate matters brought to his attention by individuals inside and outside Government, to recommend subjects for Conference study and to seek implementation of Conference recommendations. The Chairman is served by a small permanent staff whose principal duties are to furnish administrative and research support to the Assembly and Committees of the Conference, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations and in providing advice and assistance to the agencies and to committees of the Congress.

Robert A. Anthony, the fourth Chairman of the Administrative Conference, was appointed by President Ford on August 23, 1974. He succeeded Antonin Scalia, who is now Assistant Attorney General, Office of Legal Counsel.

Chairman Robert A. Anthony delivers his report to members of the Conference at the Twelfth Plenary Session.

THE COUNCIL

The Council consists of the Chairman and 10 other members who are appointed by the President for 3-year terms, of whom not more than one-half may be drawn from Federal agencies. Its functions are similar to those of a corporate board of directors. It has authority to call plenary sessions of the Conference and fix their agenda, to recommend subjects for study, to receive and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

In the period covered by this report, three new Council members were appointed by the President. Carla A. Hills,[1] Secretary of Housing

[1] On Sept. 22, 1975, Secretary Hills tendered her resignation from the Council, to be effective upon the appointment of her successor. At this writing, a successor has not yet been designated by the President.

Members of the Council at the Twelfth Plenary Session: Above from left to right: John W. Barnum, Lewis A. Engman, Marion Edwyn Harrison, Carla A. Hills. Below, from left to right: Harold L. Russell, Edwin M. Zimmerman, Richard C. Van Dusen. Richard E. Wiley.

and Urban Development was appointed March 14, 1975, to replace Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice, who left Government service to join the law faculty of Washington University, St. Louis, Mo. Edwin M. Zimmerman, of Washington, D.C., was appointed on the same date to succeed Richard B. Smith, of New York, whose term had expired. On September 17, 1975, Deputy Attorney General Harold R. Tyler was designated by President Ford as Vice Chairman of the Conference and member of the Council replacing Leonard Garment, former Counsel to the President.

Attorney General Edward H. Levi addressing the Thirteenth Plenary Session.

THE ASSEMBLY

The Assembly of the Conference is composed of the entire membership, which by statute may not be less than 75 members nor more than 91. The Conference at present has 91 members. The Chairman and the other members of the Council account for 11 of this number; the remaining 80 fall into the following groups:

First, the Act confers membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission (5 U.S.C. § 573(b)(2)). Under this provision 13 boards and commissions have statutory members. In addition, pursuant to 5 U.S.C. § 573(b)(4), three of these agencies have been allotted a second member by the Council for the purpose

of permitting the designation of two administrative law judges and a permanent member of an Atomic Safety and Licensing Board Panel. The agencies in this category, with the number of members, are:

1. Board of Governors of the Federal Reserve System	1
2. Civil Aeronautics Board	1
3. Commodity Futures Trading Commission	1
4. Consumer Product Safety Commission	1
5. Federal Communications Commission	1
6. Federal Home Loan Bank Board	1
7. Federal Maritime Commission	1
8. Federal Power Commission (Includes Administrative Law Judge.)	2
9. Federal Trade Commission (Includes Administrative Law Judge.)	2
10. Interstate Commerce Commission	1
11. National Labor Relations Board	1
12. Nuclear Regulatory Commission (Includes Permanent Member, Atomic Safety and Licensing Board Panel.)	2
13. Securities and Exchange Commission	1
Total	16

Second, the Act grants membership to the head of each executive department or other administrative agency (or his designee) which is named by the President (5 U.S.C. § 573(b)(3)). Acting under this authority, the President has designated all 11 Cabinet departments for membership, and the Council has acted to provide some of them additional members, as follows:

1. Department of State	1
2. Department of the Treasury (Includes Internal Revenue Service.)	2
3. Department of Defense	1
4. Department of Justice	1
5. Department of the Interior	1
6. Department of Agriculture	1
7. Department of Commerce	1
8. Department of Labor	1
9. Department of Health, Education, and Welfare (Includes Social Security Administration and Food and Drug Administration.)	3
10. Department of Housing and Urban Development	1
11. Department of Transportation (Includes Federal Aviation Administration.)	2
Total	15

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The other administrative agencies designated for membership by the President are as follows:

1. Environmental Protection Agency	1
2. Federal Deposit Insurance Corporation	1
3. Equal Employment Opportunity Commission	1
4. Federal Energy Administration	1
5. General Services Administration	1
6. National Aeronautics and Space Administration	1
7. Office of Management and Budget	1
8. Occupational Safety and Health Review Commission	1
9. Small Business Administration	1
10. U.S. Commission on Civil Rights	1
11. U.S. Civil Service Commission	1
12. U.S. Postal Service	1
13. Veterans Administration	1
Total	13

The final group consists of the public members appointed by the Chairman with the approval of the Council for 2-year terms. These members, who must comprise not less than one-third nor more than two-fifths of the total membership, are selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to Federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation. At present, the public members number 36.

The current 2-year term of all public members of the Conference runs from July 1, 1974, through June 30, 1976. Several midterm changes have occurred. A vacancy occurred in January 1975 when Richard S. Arnold of Texarkana, Ark., joined the staff of Senator Bumpers and thereby, as a Government employee, became ineligible to continue as a public member. In March 1975, the respected member Bernard Dunau of Washington died. To fill these vacancies, the Chairman, with the approval of the Council, appointed Frank M. Wozencraft of Houston, Tex., and John H. Holloman III, of Jackson, Miss. On September 9, Mr. Holloman was sworn in as a Commissioner of the Federal Power Commission, and vacated his public membership. In his place, the Chairman appointed Anthony L. Mondello of Bethesda, Md., who had recently retired as General Counsel of the U.S. Civil Service Commission, which he had represented in the Conference. Subsequently, Mr. Holloman was designated a Government member of the Conference on September 19, 1975. These changes are reflected in the list of the Conference membership, as of December 31, 1975, appearing at the front of this report.

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. It has adopted bylaws establishing nine standing committees, currently chaired by the following members:

1. Agency Organization and Personnel	Earl W. Kintner.
2. Claims Adjudications	S. Neil Hosenball.
3. Compliance and Enforcement Proceedings.	Anthony L. Mondello.
4. Grant and Benefit Programs	Geoffrey C. Hazard, Jr.
5. Informal Action	Warner W. Gardner.
6. Judicial Review	William H. Allen.
7. Licenses and Authorizations	Ben C. Fisher.
8. Ratemaking and Economic Regulation.	Ira M. Millstein.
9. Rulemaking and Public Information	Cornelius B. Kennedy.

These committees meet periodically to plan and guide research by academic consultants and by the Conference's professional staff, and on the basis of such research to frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, they are circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for final action in plenary session. The Assembly may adopt the recommendation in the form proposed, amend it, refer it back to committee or reject it entirely.

Since January 1968 the Assembly of the Conference has adopted a total of 59 recommendations, of which 10 were adopted during the period covered by this report.

Volumes I, II, and III of the Recommendations and Reports of the Administrative Conference of the United States, published in June 1970, June 1973, and June 1975, respectively, contain the official texts of the recommendations and statements adopted by the Assembly during the period January 8, 1968 to June 30, 1974. These volumes also contain the full texts of the research reports which support the recommendations and a bibliography of other reports prepared under the auspices of the Conference. (Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C.). The recommendations and statements of the Conference are also published in the Annual Reports of the Conference; in the Federal Register (38 F.R. 16839, 39 F.R. 4846, 39 F.R. 23041, 40 F.R. 27925, and 41 F.R. 3982); and those of a continuing interest in the Code of Federal Regulations, title I, parts 305 and 310.

Vice Chairman Harold R. Tyler, Jr. in debate at the Thirteenth Plenary Session. Seated at his side are Council Members Walter Gellhorn and Richard E. Wiley.

ACTIONS OF THE ASSEMBLY

The Conference's Twelfth Plenary Session, held June 5–6, 1975, adopted four recommendations and one formal statement. As the culmination of the largest project it has yet undertaken, the Conference at its Thirteenth Plenary Session, on December 11–12, 1975, adopted six sets of recommendations regarding the procedures of the Internal Revenue Service in administering the tax laws. The full texts of the Assembly's recommendations and statement appear at pp. 38–67, below. A summary of each of these actions follows:

Summary of Recommendation 75–1 Licensing Decisions of the Federal Banking Agencies

At the Federal level, entry into banking and banking markets is controlled by four Government agencies: the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, and the Federal Deposit Insurance Corporation. These agencies operate pursuant to statutes that contain little detail on the standards to be applied in determining the merits of applications for entry into the banking community. By and large the agencies have not provided this detail by adopting statements of policy or rules of general applicability defining the standards and requirements that must be satisfied in their proceedings.

As a usual practice, hearings are not held nor are explanatory opinions issued when banking entry applications are decided. As a result, the information gap that exists because of the lack of statutory standards or agency policy statements or rules is exacerbated and judicial review of such decisions, an increasingly frequent occurrence, is hampered.

The recommendation urges that the banking agencies adopt policy statements and rules of general applicability specifying as much as possible the standards relevant to banking entry applicants and the policies and regulatory objectives the agencies seek to implement in their decisional processes. In addition, reasoned opinions should be issued and published in a regular format in cases other than routine, uncontested matters and in cases which present issues of general importance. It is recognized that nonpublication may be appropriate where the grounds for rejection would lead to substantial injury to a bank or individual if made public.

Summary of Recommendation 75–2 Affirmative Action for Equal Opportunity in Nonconstruction Employment

This recommendation reflects the Conference's judgment that the application of the Government's equal employment opportunity rules for nonconstruction Federal contractors should be reviewed for possible revision to reflect more closely the characteristics of specific industry and occupational categories. At present, Department of Labor equal employment opportunity regulations, issued pursuant to Executive Order 11246, are divided into only two sets, one of which governs the construction industry, with the other applicable to all other Federal contractors. Such a division may ignore important variations in nonconstruction industries and occupations that warrant more particularized equal employment opportunity rules for Federal contractors.

Top: Consultant Frank I. Goodman, Public Member Otis M. Smith, Chairman Anthony. Middle: Public Member Kenneth Culp Davis (left) and Commissioner Philip A. Loomis, Jr. (right) in debate; between them: Members Sol Lindenbaum (obscured), Penelope H. Thunberg, Robert H. Young; foreground: Council Member Richard E. Wiley. Botton: Public Member Earl W. Kintner (standing), Robert G. Dixon, Jr. and William A. Nelson.

The recommendation also addresses the system of sanctions for breaches by Federal contractors of the equal employment opportunity clauses in Government contracts. The Department of Labor is urged to pursue, legislatively if necessary, the adoption of a system of graduated sanctions. Sanctions should not be imposed except after opportunity for a hearing.

The concluding section of the recommendation is addressed to the Department of Health, Education, and Welfare as the primary agency responsible for equal employment opportunity compliance by Federal contractors in the field of higher education. Several procedural changes are recommended, including the adoption of better defined and uniform policies, the recruitment of staff familiar with the field of higher education, and greater coordination with representatives of higher education and other concerned Federal agencies.

Summary of Recommendation 75–3 The Choice of Forum for Judicial Review of Administrative Action

This recommendation seeks to formulate criteria for use by Congress in selecting the appropriate forum for judicial review of Federal administrative action, and, in particular, the criteria for choosing between review in the district courts and the courts of appeals. The recommendation rests on three basic premises: (1) direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy; (2) direct review by the courts of appeals is not necessarily rendered unfeasible by the absence of an evidentiary record; but (3) in the interest of conserving scarce judicial resources review by the courts of appeals should, to the extent possible, be reserved for the resolution of major issues of law or policy.

Administrative review cases should be heard in the district courts if they do not present issues of law or policy of major impact and if they would not ordinarily be appealed to the courts of appeals unless brought there initially. Where district court decisions in administrative cases are frequently appealed and legal questions or major policy issues are lacking, the legislation to make review by a court of appeals discretionary should be considered. Review of Social Security Administration orders in cases of disability, health insurance, retirement, or survivors' benefits should continue to be in the district courts; if the volume of appeals from such district court decisions increases, Congress should consider permitting discretionary review in the courts of appeals.

The Congress should consider making orders of the Department of Labor Benefits Review Board in black-lung cases initially reviewable in district court rather than the courts of appeals as the law now provides.

With respect to judicial review of rules adopted pursuant to the notice-and-comment procedures of 5 U.S.C. § 553, direct review by a court of appeals is warranted if the public interest requires a prompt ruling and an appeal of a district court decision would ordinarily be taken in any event. The absence of a formal trial-type hearing record does not necessarily negate the propriety of direct court of appeals review. Rules issued by agencies that regularly engage in formal adjudiciation and whose orders are directly reviewable in the courts of appeals should in any event be reviewable directly in the courts of appeals.

Informal actions other than rules should be reviewed initially by a district court, except in cases where eventual court of appeals review is likely, issues of law or major policy considerations are present, and an evidentiary trial is not needed.

Statutory authorization for the transfer of jurisdiction among Federal courts should be expanded in the interests of justice and expedition of the appellate process.

Summary of Recommendation 75–4 Procedures To Insure Compliance by Federal Facilities With Environmental Quality Standards

Despite large Federal expenditures, uniform and consistent compliance with Federal and non-Federal environmental standards has not been achieved by the more than 20,000 facilities owned or operated by the United States. Moreover, there are unjustifiable variations among the enforcement procedures employed at all levels of government in securing compliance by Federal facilities with air, water, noise, solid waste, and ocean-dumping standards. The resulting lack of uniformity has been compounded by conflicting court interpretations of the applicability of non-Federal standards and procedures to Federal facilities.

The Conference recommends that Congress delegate to one agency exclusive authority to insure compliance by Federal facilities with all applicable non-Federal environmental requirements. Procedures used to effectuate compliance with such non-Federal standards should provide for local notice to the public and to relevant local public officials, an opportunity for public hearing, and authority for the presiding official to make recommendations concerning compliance.

Summary of Statement on Strengthening Regulatory Agency Management Through Seminars for Agency Officials

A formal statement was adopted by the Assembly recommending that the Conference, with the participation of the Civil Service

Top left: Consultant Jan Vetter, Grant and Benefit Programs Committee Chairman Geoffrey C. Hazard, Jr. Top right: Informal Action Committee Chairman Warner W. Gardner, Executive Secretary Richard K. Berg. Middle: Former Chairman Jerre S. Williams, Public Member Clark Byse (standing), HEW Member Malcolm Mason, Mr. Gardner, Public Member Harry H. Voigt, Judge Harold Leventhal. Bottom: Treasury Department Member Wolf Haber, Commissioner Constance B. Newman, Public Member Jack Greenberg, Agriculture Department Member Donald A. Campbell, Public Member Richard W. Pogue.

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Commission and the concerned agencies, conduct periodic seminars for members and top staff personnel of the regulatory agencies in order to exchange views on management problems, approaches to policy formulation, relationships among the agencies and with other segments of government, and the unique problems that arise in a collegial agency. The seminars should place special emphasis on the interests and needs of officials who are newly appointed to their positions.

Summary of Recommendation 75–5 Internal Revenue Service Procedures: the Audit and Settlement Processes

Internal Revenue Service personnel should provide a written explanation when requisitioning a tax return for audit purposes and such explanation should be reviewed by the requesting officer's group manager. Routine reasons justifying requisitions should be specifically and narrowly defined.

Taxpayers selected for audit should be provided a brief written explanation of the basis for their selection. Selection programs and criteria should, to the extent feasible, be established in advance. The Service should publish statistics annually showing, by income level, the results of its audits for each of its selection programs and criteria. The Service should conduct an ongoing evaluation of its selection of returns for audit.

Each year the Service should notify taxpayers that tax returns and supporting records should be maintained for at least 3 years because of the possibility of audit and that receipt of a tax refund does not preclude a later audit of the tax return filed for that year.

When a taxpayer has been audited once or more in the preceeding 3 years with little or no change in tax liability, special procedures should minimize the possibility of unnecessary repetitive audits. Such procedures should provide that the return of such a taxpayer will not be assigned for audit unless it is accompanied by an adequate file of the results of the recent audit.

The examining officer and the group manager should review both the current return and the previous audit history.

The Service should assign some of its most capable and experienced revenue agents and auditors to the taxpayer compliance measurement program under which a random sample of all returns filed in a particular year is selected for intensive audit in order to determine the characteristics of returns that result in the most significant tax changes.

The Service should periodically publish an analysis of a representative sample of settlements resulting from audits which involve commonly controverted issues. The recovery ratio in such settlements should be identified for each taxpayer class in terms of the amounts

of tax involved, whether or not the taxpayers were represented, and patterns of geographic variation.

The recommendation urges the Service to seek funds from the Congress to study the effectiveness of methods used to measure and promote voluntary compliance with the tax laws.

Summary of Recommendation 75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes

With respect to the notice to delinquent taxpayers that forcible collection is contemplated, the Service should experiment with sending the "Final Notice Before Seizure" by certified mail, return receipt requested. Such notice should indicate that forcible action can be taken any time after 10 days from the date of such notice and that no further notice may be given. However, if considerable time passes before action is taken, additional notice should be provided, by telephone or personal contact if possible.

The Service should set forth the factors to be considered in determining whether a tax lien should be recorded or filed, together with procedures to insure, to the extent feasible, that the taxpayer has notice of the filing of such liens. When a delinquent tax account is satisfied the Service should cause the lien to be released, without the need of the taxpayer so requesting.

The Service should promulgate specific guidelines for the use of its power to levy on liquid assets of taxpayers. Illustrations should be provided of the circumstances justifying the use of its levy powers. To prevent undue hardship, legislation should exempt from levy a minimum amount of the taxpayer's wages, based in part upon the number of the taxpayer's dependents. The legislation should also provide that the levy be continuous until the tax liability is satisfied or becomes unenforceable because of the lapse of time.

The seizure and sale of nonliquid assets should be carried out pursuant to procedures that insure that the taxpayer is injured as little as possible by such action. Responsibility for deciding upon a seizure and sale should be assigned to group managers rather than revenue officers. Before ordering seizure and sale the group manager should determine that the proceeds from the sale of the taxpayer's property will exceed the anticipated expenses of the seizure and sale. Procedures should be provided for the return to the taxpayer of any seized property the sale of which is unlikely to result in a return in excess of the Service's expenses. Data should be collected and analyzed concerning seizures and sales.

Undue hardship should continue to be used by the Service as a basis for not exercising its levy and seizure powers. To make the application of this current practice more uniform, specific criteria and procedures

should be adopted. The taxpayer should be provided with clear guidance on what evidence or documentation is required to demonstrate the propriety of a hardship exemption and with sufficient time to produce the necessary information before levy or seizure.

Taxpayers should be permitted to pay delinquent taxes in installments in appropriate circumstances. Installments should have minimum and maximum limits, so that the processing cost to the Service does not exceed the payments and the cost to the taxpayer does not exceed his net income less expenses for necessaries. The use of installment payments should not be disallowed simply because of the length of time needed to satisfy a debt. However, when the time period involved exceeds the period provided in the statute of limitations, the taxpayers should be required to waive that defense. The installment agreement should be reviewed at least annually to reevaluate the taxpayer's ability to discharge the debt more expeditiously.

The Service should adopt procedures that permit a taxpayer to contest the necessity and amount of a jeopardy or termination assessment at the earliest possible time. As soon as practicable after such an assessment has been made, the taxpayer should be provided with a full written explanation of the facts relied upon by the District Director in making the assessment and in computing the tax owed. Upon request, the taxpayer should be granted an informal conference with Service personnel. The Internal Revenue Manual should make it clear that a jeopardy or termination assessment cannot be imposed unless the District Director determines on the basis of substantial existence that a tax is due and the eventual collection of the tax is jeopardized. Procedures should be specified for the release of property in such proceedings upon presentation of adequate surety.

Records crediting employer payments of withheld employee income and social security taxes should be forwarded directly to the Service by commercial banks.

The Service should make the officers of new businesses aware of their potential personal liability for payment of withheld employee taxes.

Summary of Recommendation 75-7 Internal Revenue Service Procedures: Civil Penalties

The Internal Revenue Service should conduct and publish annually a statistical and analytical evaluation of the civil penalty system.

With respect to underpayment of tax, the Conference recommends that the Internal Revenue Code be amended to restructure the current penalty system. Specifically, it is suggested that the 5-percent negligence penalty should be retained, with the taxpayer having the burden to establish by a preponderance of the evidence that he has not been

negligent. The application of the 5-percent penalty for "intentional disregard of rules and regulations (but without intention to defraud)" should be repealed.

A new midpoint penalty of something in the range of 25 percent should be provided for "reckless or intentional conduct (but without willful attempt to evade payment of tax)." A taxpayer could not be found "reckless" if his underpayment resulted from a bona fide disagreement with the Service about tax law or its application to the facts disclosed on his return. A taxpayer cited for this new category of conduct would have the burden to establish by a preponderance of the evidence that his conduct was not reckless or intentional. If the taxpayer sustained his burden of proof the court would be empowered, nevertheless, to impose the lesser penalty for negligence even if such a penalty had not been assessed previously by the Service.

The penalty for fraud should be retained at 50 percent but should be reformulated to apply to a "willful attempt to evade payment of tax." In imposing this penalty the Service should have the burden of establishing fraud by clear and convincing evidence; if the court is persuaded that a portion of the underpayment is attributable to fraud the burden should shift to the taxpayer to establish by preponderance of the evidence that the rest of the underpayment is not also attributable to a willful attempt to evade payment of tax. The court could nevertheless impose the penalty for reckless or intentional conduct or for negligence, provided the Service has so proposed and the taxpayer has had an opportunity to present evidence establishing that he is not chargeable with such conduct.

In imposing any of the penalties for underpayment, the penalty rate should be applied only to that portion of the underpayment that is the result of conduct for which such penalty is assessed.

The Service should seek statutory instruction whether it should publicize the imposition of the 50 percent civil penalty for underpayment of tax because of fraud.

The Conference also recommends legislative restructuring of the system of civil penalties for failure to file a tax return or to pay a tax. Options are suggested which would lengthen the time before the penalty for failure to file a return would reach the aggregate maximum rate of 25 percent. This penalty would be imposed in addition to any penalty for underpayment. The reasons justifying the late filing of a tax return should be included in the Service's regulations or in some other form readily available to the public.

Taxpayers penalized for failure to file a return or to pay tax should be accorded administrative settlement procedures and Tax Court review rights similar to those accorded taxpayers penalized for underpayment of tax.

Summary of Recommendation 75–8 Internal Revenue Service Procedures: Tax Return Confidentiality

The Conference adopted this recommendation for the express purpose of substantially narrowing the authority of the Internal Revenue Service to disclose tax returns (defined to include related information) of individuals and decedents to other governmental authorities and agencies. The tax returns of business organizations, even though they may have bearing on the tax liability of individuals, are outside the scope of the recommendation. However, the recommendation includes a statement urging the Congress to establish rules and conditions governing the disclosure and confidentiality of all categories of tax returns.

The basic thrust of this recommendation is that the Congress should enact legislation expressly designating the persons to whom and the purposes for whom tax returns can be disclosed, and specifying the procedures governing disclosure, including appropriate limits on the use and redisclosure of the information supplied. The recommendation goes on to identify the nature and circumstances of appropriate disclosure to other Federal agencies, the President, committees of Congress, and the States.

With respect to disclosure of tax returns to other Federal agencies, the recommendation identifies the five following situations where disclosure is currently made and which should be allowed to continue pursuant to statutory authorization:

- To any office of the Treasury Department for use that is necessary to its exercise of responsibility for the administration of the tax laws, or the preparation of economic analyses.
- To a U.S. attorney, or to an attorney of the Department of Justice, for use in preparing for and conducting civil or criminal litigation that is related to administration of the tax laws; provided, that any such disclosure shall be limited to: (i) the tax return of the taxpayer who is a party to the litigation; (ii) the tax return of an alleged coconspirator of such party; and (iii) the tax return of any other taxpayer which contains information that is pertinent to an issue in the litigation, and provided further, that when any such disclosure is to be made in response to a request initiated by any such attorney, the request shall be in writing and state with specificity the reasons for seeking the tax return.
- To the Bureau of the Census and to the Bureau of Economic Analysis of the Department of Commerce for use that is necessary to their respective statistical collection and publication responsibilities.
- To the Social Security Administration for use that is necessary to its responsibility for administering the Social Security Act.

- To the Department of Labor and to the Pension Benefit Guaranty Corporation for use that is necessary to their respective responsibilities for administering the Employee Retirement Income Security Act.

Beyond these categories, the Assembly expressly declined to address the extent of permissible disclosure of tax returns to other Federal agencies for use in litigation or investigations unrelated to the administration of the tax laws. It stated, however, that tax return information should never be disclosed to assist in the selection of Federal jurors.

Executive Order 11805, issued by the President on September 20, 1974, governs disclosure of tax returns to the Executive Office of the President. The legislation called for by the Conference recommendation on this subject would further require that: (1) any Presidential request state the reasons for seeking a tax return and the uses to which it will be put, and state that the return will not be reproduced or used or redisclosed for any other use; (2) disclosure by the Service be made only in written form and only to the President or his designee; (3) the written material be returned to the Service after use; and (4) the IRS maintain records of its disclosure to the White House and submit annual reports thereof to congressional committees that have responsibility for oversight of IRS administrative procedures.

Disclosure to congressional committees should also be governed by statute. The Internal Revenue Code currently authorizes disclosure to the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Internal Revenue Taxation. While the Conference recommends that such disclosures should be continued, it opposes disclosure to any other committee unless authorized by House or Senate resolution, or in the case of a joint committee, by concurrent resolution.

The Conference would continue the authorization now provided for disclosure of tax returns to the States, but with additional protections against misuse or redisclosure of information provided. One of these additional safeguards would condition disclosure to a State on its having enacted a statute making it a crime for any personnel to make improper disclosure of information obtained from the Internal Revenue Service. Another would extend protections to information similar to that compiled for the Federal return and submitted by the taxpayer himself directly to the State or local authorities. Further, the Service by regulation should establish procedures for determining the sufficiency of State laws, for monitoring State enforcement thereof, for auditing and enforcing the performance by States of their obligations provided in agreements made to obtain disclosure, and for suspending such disclosure whenever such obligations are not performed.

The recommendation concludes with two suggested revisions of current IRS internal procedures regarding access to tax returns. One

would provide a system of monitoring the requisitioning of returns by Service employees, to eliminate unnecessary inspections of returns. The second would require the Service to include in the tax return or other appropriate place notice to taxpayers of the disclosures that could be made of information supplied by the taxpayer when filing his return. Such notice should include reference to a document which the Service should prepare and make available, explaining fully the range of disclosures permitted by law, the purposes for such disclosure, and the procedures followed in making such disclosures.

Summary of Recommendation 75–9 Internal Revenue Service Procedures: Taxpayer Services and Complaints

The Conference in this recommendation suggests improvements in the Service's efforts to provide taxpayers with assistance and advice in complying with the bewildering complexity of tax laws and regulations.

In order to better perceive the nature and frequency of the services needed by taxpayers it is recommended that the Service should compile data from year to year on the personnel and funds devoted to its major taxpayer service functions. These data should include information on the manpower and budget needed to reply to requests for assistance on administrative and procedural matters, tax law advice and guidance in tax return preparation, and responses to general inquiries about the Service and its requirements.

The IRS should initiate a system to screen taxpayer inquiries and refer questions requiring specialized knowledge to Service employees with appropriate training and competence. To undertake such a program the Service should identify the areas of most frequent inquiry, train personnel to screen and refer inquiries properly, and specifically train personnel to respond knowledgeably

When providing tax law advice, the Service sh.ould inform the taxpayer that the advice given is based on the Service employee's comprehension of the facts provided by the taxpayer, that the Service is not bound by the advice, that if there is more than one interpretation of the law that the taxpayer is so informed and advised to seek his own tax law advice, and that all records pertaining to the subject of inquiry should be retained for at least 3 years.

Finally, the Conference recommends that the IRS establish regular procedures to provide prompt and impartial responses to taxpayer complaints about the conduct of individual Service employees. Such procedures should be well publicized and easily accessible to taxpayers. The Service should design and operate its complaint handling procedures so as to identify the causes of legitimate complaints and enable it to take the necessary steps to eliminate problems.

Summary of Recommendation 75–10 Internal Revenue Service Procedures: The IRS Summons Power

In the judgment of the Conference the summons form used by the IRS is cluttered with extraneous language and references to statutes, regulations, and fact situations. Such information should be deleted and replaced by a brief and specific description of the procedures available to taxpayers for raising objections to the summons or to questions raised at the appearance. This information should be printed in a prominent position and type style. With it should appear a statement that a court order compelling compliance could be sought by the Service if the summoned party fails to appear or to respond to questions, and that willful and unjustified failure to comply with the summons could subject the taxpayer to contempt proceedings or criminal charges.

At the time a summons is served on a third party, or as soon as feasible thereafter, the Service should transmit a copy of the summons to the person about whom information is sought.

To better evaluate the use of the summons power by its employees the Service should compile statistics and analyses of the number of summonses issued, classification of employees issuing them, and compliance with them voluntarily or otherwise.

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ACTIVITIES OF COMMITTEES

Much of the work of the Conference is carried forward by the nine standing committees, each of which has a generally prescribed field of inquiry suggested by its title. Distinctions between committee jurisdictional responsibilities are intentionally fluid in order to permit the members wide latitude of inquiry. Since projects are often pertinent to the concerns of more than one committee, the Office of the Chairman coordinates the committees' activities to prevent conflict or duplication of effort.

1. COMMITTEE ON AGENCY ORGANIZATION AND PERSONNEL

Chairman, EARL W. KINTNER

This committee is concerned with the distribution of responsibility and authority within agencies, including the adequacy of procedures to review internal delegations and to assure separation of functions; personnel practices which bear upon the competence, professionalism, and effectiveness of personnel involved in the conduct of administrative proceedings; and administrative procedures which affect the hiring, compensation, and tenure of Federal employees.

Projects Completed During Reporting Period

Role of the Chairman in the Independent Regulatory Agencies (Consultant: David M. Welborn, University of Tennessee), resulting in Conference Statement on strengthening regulatory agency management through seminars for agency officials.

Pending

Role of Administrative Law Judges in the agency hearing process. (Consultant: Victor G. Rosenblum, Northwestern University School of Law.)

Mandatory retirement of members of independent regulatory commissions. (Consultant: Harold H. Bruff, Arizona State University School of Law.)

2. COMMITTEE ON CLAIMS ADJUDICATIONS

Chairman, S. NEIL HOSENBALL

This committee has as its responsibility the study of procedures for the administrative determination of claims against the Government for money or property, including such matters as procurement contract procedures, reparations, and proceedings arising because of damage to persons or property.

Projects Completed During Reporting Period

Agency procedures for debarment of Government contractors. (Consultant: John M. Steadman, Georgetown University Law Center.) No recommendation now contemplated.

Procedures for the resolution of postaward contract disputes in Government contracts. (Consultant: Richard E. Speidel, University of Virginia School of Law.) No recommendation now contemplated.

3. COMMITTEE ON COMPLIANCE AND ENFORCEMENT PROCEEDINGS

Chairman, ANTHONY L. MONDELLO

This committee examines administrative policies, techniques, and procedures for assuring compliance with Federal laws and regulations, including the issuance of cease and desist orders, the imposition of fines and penalties, and the application of other sanctions.

Projects Completed During Reporting Period

Procedures for assuring compliance by Federal facilities with environmental standards (staff assistance: William R. Shaw), resulting in Recommendation 75-4.

Pending

Citizen enforcement of Federal regulatory statutes: the "private attorney general." (Consultant: Jerry L. Mashaw, University of Virginia School of Law).

Conciliation procedures at the Equal Employment Opportunity Commission. Preliminary study by James O. Freedman, University of Pennsylvania Law School, has been completed.

Consent Decree Settlements by Administrative Agencies. (Consultant: Michael J. Zimmer, Wayne State University Law School.)

4. COMMITTEE ON GRANT AND BENEFIT PROGRAMS

Chairman, GEOFFREY C. HAZARD, JR.

This committee considers the procedures by which agencies administer Federal loan, grant, and benefit programs, including procedures for the award or termination of financial assistance.

Projects Completed During Reporting Period

Affirmative action for equal opportunity in nonconstruction employment (Consultant: Jan Vetter, University of California School of Law, Berkeley), resulting in Recommendation 75-2.

Pending

Effect of representation by attorneys and others in disability claims proceedings. (Consultant: William D. Popkin, University of Indiana School of Law.)

5. COMMITTEE ON INFORMAL ACTION

Chairman, WARNER W. GARDNER

This committee has a wide mandate to investigate agency action affecting private rights that do not involve formal, structured proceedings. This comprises, quantitatively, the vast bulk of all agency

action, and is often characterized by a particularly broad scope of agency discretion.

Projects Completed During Reporting Period

Discharge of psychiatric patients from Veterans Administration hospitals (Consultant: Barbara D. Underwood, Yale Law School), resulting in advice accepted by the Veterans Administration.

Coordinated study of informal decisionmaking in various agencies. (Consultant: Robert W. Hamilton, University of Texas School of Law.) No recommendation now contemplated.

Pending

Discretion in Food and Drug Administration enforcement proceedings. (Consultant: William J. Lockhart, University of Utah School of Law).

Department of Justice and Federal Trade Commission discretion in investigating and prosecuting civil antitrust cases. (Consultant: Thomas J. Maroney, University of Syracuse Law School.)

Criteria and methodology for evaluating particular procedures in informal adjudications. (Consultant: Paul R. Verkuil, University of North Carolina School of Law.)

6. COMMITTEE ON JUDICIAL REVIEW

Chairman, WILLIAM H. ALLEN

This committee examines the developing statutory and decisional law concerning judicial review of administrative action, and those aspects of administrative procedure that have particular effect upon the availability or effectiveness of judicial review. While these matters are studied primarily from the perspective of the agencies, the committee also necessarily considers the effect of relevant case law and of new proposals upon the functioning of the courts themselves.

Projects Completed During Reporting Period

Judicial Review of Federal Administrative Action: The Quest for the Optimum Forum (Consultants: David P. Currie, University of Chicago School of Law and Frank I. Goodman, University of Pennsylvania School of Law), resulting in Recommendation 75-3.

Pending

Hybrid rulemaking: procedures for informal rulemaking beyond those required by 5 U.S.C. § 553. (Consultant: Stephen F. Williams, University of Colorado School of Law.)

Techniques for application of the doctrine of primary jurisdiction by Federal courts. (Consultant: Michael H. Botein, Rutgers University School of Law.)

Justice Department control of agency litigation. (Consultant: John F. Davis, University of Maryland School of Law.)

The implications of judicial review for the practical procedures in § 553 rulemaking proceedings. (Consultant: Nathaniel L. Nathanson, Northwestern University School of Law.)

Need for and feasibility of a small-case administrative review tribunal. (Consultant: Hans A. Linde, University of Oregon School of Law.)

7. COMMITTEE ON LICENSES AND AUTHORIZATIONS

Chairman, BEN C. FISHER

This committee examines the process of licensing or certification to engage in activities which require Federal Government authorization. It is concerned with all aspects of that process, including grant, denial, transfer, modification, suspension, and termination.

Projects Completed During Reporting Period

Licensing decisions of the Federal banking agencies (Consultant: Kenneth E. Scott, Stanford University School of Law), resulting in Recommendation 75–1.

Pending

Procedures for action upon waiver and exemption applications. (Consultant: Marshall Breger, University of Texas School of Law.)

Competitive Federal and State regulation of banking. (Consultant: Kenneth E. Scott, Stanford University School of Law.)

8. COMMITTEE ON RATEMAKING AND ECONOMIC REGULATION

Chairman, IRA MILLSTEIN

This committee studies the procedures employed by the regulatory agencies in establishing rates, prices, and other charges for regulated industries. It also examines procedures of all agencies with respect to activities that have the effect of economic regulation, though not directed specifically toward regulated industries—such as the determination of subsidies, tariffs, and quotas.

Pending

The role of economic analysis in the regulatory agencies. (Consultants: Stephen G. Breyer, Harvard Law School and Dean Ernest A. E. Gellhorn, Arizona State University School of Law.)

Treatment of trade secrets and confidential information in agency proceedings. (Consultant: Warren Schwartz, University of Virginia School of Law.)

Administration of energy shortages. (Consultant: Mason Willrich, University of Virginia School of Law.)

Procedural aspects and consequences of various patterns of reform of the regulation of transportation. (Consultant: Donald I. Baker, Cornell University Law School.)

Use of surveys in Federal Trade Commission determinations. (Consultant: Dean Ernest A. E: Gellhorn, Arizona State University School of Law.)

9. COMMITTEE ON RULEMAKING AND PUBLIC INFORMATION

Chairman, CORNELIUS B. KENNEDY

This committee examines the areas of administrative activity appropriate for the conduct of rulemaking and studies the procedures employed. As a separate but related charge, the committee looks

to the public availability and dissemination of information on agency procedures, policies, and action.

Pending

Standards for publication in the Federal Register. (Consultant: Edward A. Tomlinson, University of Maryland School of Law.)

Trade regulation rulemaking procedures of the Federal Trade Commission. (Consultant: Barry B. Boyer, University of Virginia School of Law.)

Promulgation and effect of interpretative rules, policy statements and guidelines, and the like. (Consultant: Michael Asimow, University of California School of Law.)

Hybrid rulemaking: procedures for informal rulemaking beyond those required by 5 U.S.C. § 553. (Consultant: Stephen F. Williams, University of Colorado School of Law.)

ACTIVITIES OF THE CHAIRMAN'S OFFICE

BUDGET AND STAFF

In fiscal year 1975 the Congress appropriated $750,000 for the Conference. For fiscal year 1976 the budget was increased to $785,000, with $196,000 appropriated for the transitional quarter July 1 to September 30, 1976.

The number of staff positions at the Conference during the period of this report increased from 14 to 16. These permanent full-time personnel were assisted in the work of the Conference by several part-time consultants and legal interns from various law schools.

During debate on the Internal Revenue Service procedures project, left to right: IRS Chief Counsel Meade Whitaker, Principal Consultant Charles Davenport, Steering Committee Chairman Sheldon S. Cohen.

MAJOR PROJECTS

1. Uniform Caseload Accounting System

In fiscal year 1975, the first year of operation of this system, the Office of the Chairman collected caseload and individual case data from 22 Federal agencies and departments which employed administrative law judges to preside over formal APA proceedings. (At least three more agencies are being added in fiscal year 1976.) The system was designed by Norbert A. Halloran, a senior management analyst of the Administrative Office of the United States Courts. Its success depends on close cooperation by the administrative law judges, their staffs, and the docket sections within each reporting

agency. Consultations with agency personnel have resulted in improvements in the internal reporting procedures used by many agencies as well as in the Conference's specially designed reporting forms. Arrangements have been made with the General Services Administration for data processing.

It is expected that the first annual report under this system will be completed in the spring of 1976. This report, the first of a projected 3- to 5-year trial reporting period, will present, for each type of formal adjudicative proceeding in each agency, data concerning the number of cases initiated and terminated on a quarterly basis, the average time spent in prejudicial, judicial, and postjudicial segments of the decisional process, the manner of termination of the cases, and, wherever possible, the time and judicial effort involved per case.

This project represents an attempt to apply to formal administrative proceedings statistical techniques that have been used and refined with respect to Federal judicial proceedings over the past 30 years. The number of Federal administrative law judges is now more than double the number of Federal district judges and there is need for some equivalent information base to assess the requirements and measure the performance of this important component of our legal system. There are of course wide variations in agency procedures, in types of cases and in agency manpower, that make any form of generalized performance analysis quite risky. However, as long as these variations are kept in mind and explained wherever necessary, the data as developed by the Conference ought to be of use both to the agencies themselves and to the Congress in allocating resources and in identifying areas of delay and inefficiency.

2. Federal Trade Commission Trade Regulation Rulemaking Project

The Conference has initiated a study of the Federal Trade Commission's newly adopted trade regulation rulemaking procedures whereby the Commission prescribes rules to define unfair and deceptive acts and practices in or affecting commerce. The new FTC procedures were promulgated under section 18 of the Federal Trade Commission Act as amended by the "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act" (Public Law No. 93-637, Jan. 4, 1975) ("the FTC Improvement Act"). This act specifically directs that ACUS study and make a report to Congress on the new procedures.

The FTC Improvement Act prescribes a number of specific procedures for the promulgation of trade regulation rules which are additional to the procedures required for "informal" or "notice and comment" rulemaking under section 553 of the Administrative Procedure Act.

In addition, the Commission is authorized to provide compensation for reasonable attorney fees, expert witness fees, and other costs of participating in a rulemaking proceeding to any person: (1) who has an interest that might not otherwise be adequately represented and whose representation is necessary for a fair determination of the rulemaking proceeding; and (2) who cannot afford to participate as may be appropriate through oral presentations, conducting cross-examination, and making rebuttal submissions.

The newly required rulemaking procedures and the authority to compensate for the costs of participating in rulemaking proceedings appear to be designed to strengthen the opportunity for participation by interested persons, to expand the opportunity for participants to challenge the legal and factual bases of FTC's proposed rules, and thereby to promote the soundness and acceptability of the FTC's trade regulation rules. However, the new procedures have been criticized on the grounds, among others, that they will have undesirable effects on rulemaking proceedings, by increasing their complexity, enhancing their adversary quality, increasing the cost of participating in the proceedings, and thereby affecting adversely both the extent and character of such participation.

The Conference's study of FTC Trade Regulation Rulemaking is being conducted by a full-time staff under the direction of Barry B. Boyer, visiting associate professor, University of Virginia Law School. Its purpose is to determine the extent to which the procedures achieve their designed effects and the extent to which they produce the predicted undesirable effects on FTC rulemaking. The study staff will compile empirical data—systematically, and as completely as practicable—regarding the conduct of specific rulemaking proceedings. Sources of data will include direct observation of rulemaking hearings and prehearing conferences, interviews with rulemaking participants and others likely to be affected by the proposed rules, and examination of documentary rulemaking records. The study will solicit viewpoints and suggestions from individuals and organizations representing a wide range of interests.

3. Study of Procedures of the Internal Revenue Service

A primary and indeed at times predominant focus of the Office of the Chairman through all of 1975 was the major Internal Revenue Service procedures study, which is the largest project yet undertaken by the Conference. It was carried out by a team of consultants and special staff, directed by Charles Davenport formerly on the law faculty of the University of California at Davis, currently Assistant Director of the Congressional Budget Office, and guided by a distin-

guished steering committee, composed of the Chairman of the Conference and the following individuals:

Prof. WALTER J. BLUM
University of Chicago Law School

SHELDON COHEN, *Esquire*
Cohen & Uretz
Washington, D.C.

Prof. VICTOR H. KRAMER
Director, Institute for Public Interest Representation
Georgetown University Law School

HARRY K. MANSFIELD, *Esquire*
Ropes & Gray
Boston, Mass.

DON J. SUMMA, *CPA*
Arthur Young & Co.
Newark, N.J.

DEAN BERNARD WOLFMAN
University of Pennsylvania Law School

After chairing meetings of the committee through much of the year, Chairman Anthony resigned from it, with the result that Mr. Cohen has become Chairman of and spokesman for the committee. The project was carried to a successful culmination through adoption at the December 1975 Plenary Session of six sets of recommendations, each concerned with an area of tax administration, as set forth elsewhere in this report. The steering committee is being kept intact to monitor compliance with these recommendations and to consider further studies.

4. REGULATORY REFORM

In December 1975, the Office of the Chairman undertook an in-depth examination of the procedural aspects of regulatory reform. The project is intended to develop a comprehensive program of suggested procedural changes in the current spirit of "regulatory reform." Work has begun with the cataloging of many of the current problems in the regulatory sector. This inventory will serve to define the dimensions and priorities of the project. It is anticipated that major items and issues will be identified in principal areas of regulatory activity such as agency structure, adjudication, rulemaking, and judicial review. Various activities and proposals will then be developed to address specific problem areas. These activities and proposals will take any of a number of forms: Topics for further research by ACUS consultants; proposals for action by the Conference; cooperative studies with individual agencies either on an ad hoc basis or through an agency committee which is looking at procedural changes; coordination with others active in the area; and, the submission of proposed legislation.

ADVICE AND ASSISTANCE TO THE AGENCIES

The Chairman's Office receives frequent requests from other agencies for guidance and advice on procedural matters. Responding to

these inquiries has become a routine responsibility of members of the professional staff. The following items illustrate the range of such activity:

- Advice and staff assistance as a permanent observer to the CAB's Advisory Committee on Procedural Reform;
- Advice and staff assistance to the Occupational Safety and Health Review Commission in its effort to expedite its decisional process;
- At the request of the Marine Mammal Commission, assistance in the promulgation of National Oceanic and Atmospheric Administration rules relating to the protection of marine mammals taken incidental to commercial fishing;
- Advice and staff assistance to the Interior Department in implementing a civil money penalty system in accordance with Recommendation No. 72–6.
- At the request of the Office of Management and Budget, comments were submitted on a number of pending legislative proposals, including: A bill (S. 4145) to establish a National Commission of Regulatory Reform; a Department of Interior draft bill to abolish the Federal Metal and Nonmetallic Mine Safety Board of Review; several bills (H.R. 9312, H.R. 3846, and S. 727) to establish legislative veto powers over agency rulemaking; a Civil Service draft bill to transfer judicial review of certain Commission orders from the district courts to the courts of appeals; an EPA draft bill to provide that judicial review of effluent guidelines be directed to the U.S. Court of Appeals; and a Department of Agriculture draft bill to provide for administrative imposition of civil penalties for violation of the provisions of the Food Stamp Act of 1964.

In addition, the Chairman has initiated informal monthly meetings between Conference staff and senior staff members of regulatory agencies with ratesetting responsibilities, to discuss problems and exchange ideas on the procedural aspects of the ratemaking process. Under the direction of Conference personnel, this task force on ratemaking procedures is composed of representatives of the Civil Aeronautics Board, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Interstate Commerce Commission, and the Postal Rate Commission. It is expected that this task force will promote greater collaboration among these agencies, and will identify fruitful areas of inquiry for Conference research projects.

ADVICE AND ASSISTANCE TO CONGRESS

As in the past, responding to congressional inquiries is another major responsibility of the staff of the Conference. The executive secretary, for example, testified with respect to the Government in the Sunshine bill (S. 260) before the Senate Committee on Government Operations, and on amendments to the Administrative Pro-

cedure Act (H.R. 10194 through 10199), House Committee on the Judiciary.

Significant written presentations to the Congress concerning pending legislation have included comments to the House on section 202(a) of H.R. 7917, a bill to amend section 18 of the Federal Trade Commission Act, on H.R. 16183, a bill to amend the Freedom of Information Act, and on S. 1717 and H.R. 7002, amendments to the Atomic Energy Act of 1954 to improve the nuclear facility licensing process, before the Joint Committee on Atomic Energy. At the request of the Senate Subcommittee on Penitentiaries, the Office of the Chairman commented upon S. 1463, a bill to amend the Parole Commission Act.

IMPLEMENTATION OF RECOMMENDATIONS

In August 1975, the Office of the Chairman initiated a project to survey the present status of implementation of Conference recommendations and to develop proposals to improve the degree and quality of such implementation. Max D. Paglin, recently retired from the Nuclear Regulatory Commission and a longtime member of the Conference and former Chairman of the Committee on Agency Organization and Personnel, has been retained to conduct the study. Mr. Paglin is reviewing and analyzing the present condition of implementation of about twenty major Conference Recommendations and will recommend what action, if any, should be taken on each of the designated recommendations with respect to each of the agencies. Moreover, he will prepare a report on the present status of such implementation and his recommendations as to future organization, procedures and proposals to improve the quality and effectiveness of implementation of Conference recommendations.

Summarized below are the implementation efforts of the Office of the Chairman with respect to the Recommendations (74–1 through 74–4) adopted at the 11th Plenary Session, May 30–31, 1974.

Recommendation 74–1: Subpena Power in Formal Rulemaking and Formal Adjudication

This recommendation incorporates and expands the statement of principle adopted by the Conference in May 1974 with respect to proposed amendments to the Administrative Procedure Act by the American Bar Association. It urges the amendment of sections 556 and 557 of title 5, United States Code to make agency subpenas available in all agency proceedings, both rulemaking and adjudication, and to make clear that the power to issue subpenas in such proceedings shall be delegated to presiding officers.

The Conference submitted this proposal to both Houses of Congress. Written and oral testimony was presented to the House Committee

on the Judiciary. Several bills to amend the Administrative Procedure Act have emerged. Of these bills, section 2 of H.R. 10198 is in substantial conformity with the recommendation and section 4 of S. 796 adopts the approach contained in the recommendation.

Recommendation 74-2: Procedure for Discretionary Distribution of Federal Assistance

This recommendation calls upon each agency that administers a discretionary domestic assistance program to identify publicly the specific results it expects the assistance to achieve, to develop, and publish assistance criteria consistent with those desired results, and to use public procedures in developing and enforcing assistance criteria and requirements. Directed to all forms of Federal assistance except personal services, including not merely monetary grants but also in-kind aid, financing, insurance, and the permitted private use of public goods, the recommendation sets forth general principles and guidelines rather than specific prescriptions.

The proposal has generated widespread interest at affected agencies; some already have programs in substantial compliance with the recommendation, although many agencies lack key features it calls for. The Environmental Protection Agency indicated that its regulations and practice already are in accord with the first part of the recommendation, relating to suggested agency articulation of objectives, criteria, and requirements of discretionary grant programs. However, EPA felt that implementation of the second part of the recommendation, relating to complaint procedures for alleged violation of criteria for the award of assistance, was inappropriate in the context of its operations and submitted justification for this conclusion. Nonetheless, EPA offered to continue to evaluate its initial response to this proposal. Other agencies in partial compliance with this proposal include the Department of Health, Education, and Welfare, the Defense Supply Agency, and the Department of Commerce.

Among the agencies in substantial conformity with the recommendation is the Department of Interior, which carefully evaluated its own procedures and instructed program managers to adopt procedures in compliance. As a result, compliance efforts within the Department were initiated by the Fish and Wildlife service, Office of Water Research and Technology, National Park Service, Bureau of Reclamation, Bureau of Outdoor Recreation, and the Youth Conservation Corps. Other agencies in general compliance include the Veterans Administration, Law Enforcement Assistance Administration, and the Department of Housing and Urban Development.

Recommendation 74-3: Procedures of the Department of the Interior With Respect to Mining Claims on Public Lands

This recommendation is addressed to the procedures used by the Department of Interior for identifying hard rock mineral claims, for adjudicating such claims, and for making rules and providing public information concerning the hard rock mineral permit program. The procedures for establishing or locating mining claims, which are set out by the General Mining Law of 1872, have not been significantly amended since its passage. Among the weakenesses of the mining laws that have confused, angered, and stymied public interest groups and various agencies of the Federal Government are the virtual absence of reclamation requirements for mining, the minuscule share of the minerals' wealth reaching State and Federal coffers, and the use of Federal mineral lands for purposes other than mining. Part A of this recommendation urges the elimination of an inefficient and confusing system of establishing a mining claim. Part B seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policymaking structure, and establishing judicial review provisions in appellate rather than trial-level Federal courts, with explicit affirmation of the APA standard of review. Part C of this proposal suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

The recommendation was brought to the attention of appropriate congressional committees since at least three aspects of the proposal, those dealing with mandatory registration of claims, discovery authority, and judicial review, require or may require new legislation. Two mining bills are presently pending before Congress which reflect some of the reforms proposed in this recommendation. Other reforms may be enacted through implementation of the proposed amendments to the Administrative Procedure Act.

Recommendation 74-4: Preenforcement Judicial Review of Rules of General Applicability

This proposal identifies the administrative materials which should be considered upon judicial review of rules adopted by informal procedures. These materials should include the notice of proposed rulemaking, comments received, transcripts of oral presentations, additional information relied on by the agency, reports of advisory committees, and the agency's concise general statement or final order. It further suggests that the appropriate judicial review standard for informal rulemaking is the traditional arbitrary and capricious test found in the Administrative Procedure Act.

Shortly after the adoption of this proposal, the Office of the Federal Register circulated to Federal agencies a copy of the recommendation and the Federal Register Handbook on Document Drafting to assist in implementation of the recommendation. Further implementation of this proposal will be considered by the Judicial Conference during its April 1976 meeting. Various congressional committees have been advised of the objectives of this proposal, often in the form of advice on pending legislation.

TEXTS OF ASSEMBLY ACTIONS

RECOMMENDATION 75–1

LICENSING DECISIONS OF THE FEDERAL BANKING AGENCIES

(Adopted June 5–6, 1975)

Entry into banking is controlled on the Federal level by four agencies: the Comptroller of the Currency (for charters and branches of national banks), the Federal Home Loan Bank Board (for charters and branches of Federal savings and loan associations, and via the Federal Savings and Loan Insurance Corporation for account insurance for State-chartered savings and loan associations), the Board of Governors of the Federal Reserve System (for FRS membership and accompanying FDIC deposit insurance for State-chartered banks, and for branches of State member banks), and the Federal Deposit Insurance Corporation (for deposit insurance for State banks that are not FRS members, and for branches of such banks).

The statutes which confer these powers of approval over entry into banking and banking markets contain sketchy standards, or none at all, defining how the administrative authorities should exercise their judgment. The statutory void has not as yet been filled by the agencies themselves; none of them has adopted comprehensive statements of policy or meaningful rules of general applicability, though recently the Federal Reserve and FDIC have taken steps in this direction.

In acting upon such applications, the agencies usually do not hold hearings or issue reasoned opinions. As a consequence, little authoritative information is available concerning the policies the agencies follow in exercising their broad powers over entry into banking markets and in granting valuable authorizations to some applicants and denying them to others.

Increasingly, within the last two decades, these decisions—particularly those of the Comptroller—have been subjected to judicial review. The absence of adequate explanatory opinions by the agency has impeded review that is both meaningful and limited. Reviewing courts have too often been forced to choose between pro forma validation of agency action or substitution of the court's judgment for that of the agency.

This recommendation, addressed to the agencies, is directed at the point of greatest initial need: the provision of explanation of policies

and decisions. That can be accomplished in a variety of ways, and the recommendation distinguishes between different agency roles and types of decision, in a manner intended to avoid unnecessary demands upon agency resources. Moreover, the Freedom of Information Act (5 U.S.C. § 552) requires agencies to make available to the general public whatever statements of agency policy and opinions in individual cases they have prepared. This recommendation is in furtherance of those statutory objectives.

Applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. This possibility is not a justification for a general policy of nonexplanation; it should not be automatically applied to shield all negative information. Occasionally, nevertheless, the agency may believe that it would be warranted in not disclosing certain information. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be stated in general terms, such as "to prevent an adverse impact on other institutions." The extent to which supporting evidence should be revealed in camera or by some other confidential method, if judicial review were subsequently sought, is left to be decided under existing law and is outside the scope of this recommendation.

The present recommendation has limited reach. It is not intended to express either approval or disapproval of the present system of entry controls in banking, nor is it addressed to the extent of statutory discretion possessed by the Federal banking agencies in their licensing decisions, which is exceptionally broad and would remain so if this recommendation were fully accepted. What is now proposed is, simply, that when this broad discretion is exercised, the agencies should articulate their decisional standards and underlying policy objectives in a way that would facilitate understanding and evaluation on the merits.

Recommendation

1. *General.* The Federal banking agencies should undertake to provide a full statement of their objectives in approving or denying applications for charters, membership, or permission to establish branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and understanding, reasoned opinions should be issued in situations described below.

2. *Chartering authority decisions: Comptroller and Federal Home Loan Bank Board.* Charter decisions are of high importance and relatively low in number. An explanatory opinion should be furnished as a matter of course in all charter denials, since this is the most critical

entry barrier; when requested, explanation of favorable action upon an application should be provided to any objecting party or to any interested Federal agency.

In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the comptroller and FHLBB should furnish written opinions when the agency believes the case presents issues of general importance, or when requested by an applicant, an objecting party or an interested Federal agency.

3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would be excessive. For branches, therefore, the FRB and FDIC should also furnish written opinions when requested or when the agency believes the case presents issues of general importance.

Membership applications may not fall wholly into the same category, though only the FSLIC has a significant rejection ratio. Written opinions should be furnished on request, which would presumably be made infrequently by others than disappointed applicants.

4. *Publication.* All four agencies should systematically collect and publish their licensing opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the Federal Reserve Bulletin or Federal Home Loan Bank Board Journal, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.

Recommendation 75–2

AFFIRMATIVE ACTION FOR EQUAL OPPORTUNITY IN NONCONSTRUCTION EMPLOYMENT

(Adopted June 5–6, 1975)

Executive Order 11246, which concerns equal employment opportunity, applies to all contractors with the Federal Government. Pursuant to this Executive order, the Department of Labor has promulgated one set of regulations prohibiting discrimination and requiring affirmative action to govern contractors in the construction industry, and another set of such regulations to govern all other contractors.

A study of the application of the nonconstruction regulations to university faculty employment practices illustrates that the use of a

single set of regulations for all nonconstruction employment can fail to take adequate account of important special circumstances of major employment categories. With respect to university faculty employment, for example, the regulations as applied have generated difficulties arising from failure to take account of the limited supply of qualified personnel in various disciplines, the nonquantifiability of standards for academic personnel, the diversity of institutional needs fulfilled by academic personnel (*e.g.*, research, teaching, public service), different types of institutions (*e.g.*, research universities, community colleges), and the concept of peer review in academic employment practices. It seems evident that difficulties of the sorts experienced in the application of the nonconstruction regulations to academic employment in higher education will be encountered in their application to other employment categories as well.

The study further suggests that contract cancellation is in many cases too severe or impracticable as the primary sanction for noncompliance with equal employment opportunity regulations; in practice, cancellation is rarely used. The more common sanction, as in the field of higher education employment, is the declaration of nonresponsibility of an employer. Unlike the procedures leading to other sanctions, such as debarment of a contractor or cancellation of a contract, no opportunity for prior hearing is afforded in connection with a declaration of nonresponsibility. The provision of an opportunity for hearing before imposition of any sanction under the contract compliance program will tend to assure the fairness and reliability of administrative determinations and to encourage responsible and consistent application of policy.

Recommendation

1. The Department of Labor, in consultation with the compliance agencies, should promptly commence a review of the contract compliance program applicable to nonconstruction contractors to determine whether regulations more closely adapted to the characteristics of specific occupations or industries are required, considering especially: (1) variations in the susceptibility of types of employment to uniform or quantifiable methods of evaluating and predicting performance; and (2) variations in policies of recruitment and advancement and in other personnel practices.

2. The Department of Labor should develop a system of graduated sanctions for breach of the obligation contained in the equal employment opportunity clause of Government contracts, and should seek legislation to this end as may be necessary.[1]

[1] In this connection the Department should consider Conference Recommendation 71-9: "Enforcement of Standards in Federal Grant-in-Aid Programs," and Recommendation 72-6: "Civil Money Penalties as a Sanction."

3. A sanction, including that of declaration of nonresponsibility on equal employment opportunity grounds made prior to the award of a contract, should not be imposed except after opportunity for a hearing (whether evidentiary or informal) at which the validity of the claim of breach, or assertion of nonresponsibility, and the appropriateness of the proposed sanction may be placed in issue.

4. In performing its responsibilities for contract compliance in higher education the Department of Health, Education, and Welfare should: (*a*) provide regional office staffs with uniform and clearly defined policies, (*b*) recruit and assign staff who are familiar with institutions of higher education for administration of the program in higher education, (*c*) consult widely with representatives of higher education institutions and other interested groups in developing and administering its compliance rules and policies, and (*d*) strengthen coordination of its administration of regulations applicable to higher education with other agencies having overlapping responsibilities, in particular the Equal Employment Opportunity Commission and the Wage and Hour Administration of the Department of Labor.

Recommendation 75–3

THE CHOICE OF FORUM FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

(Adopted June 5–6, 1975)

This recommendation states criteria for use by the Congress in determining the appropriate forum for judicial review of Federal administrative action.

The present forum for the review of most agency actions taken on formal evidentiary records is the court of appeals under specific statutory provisions. There are some exceptions. An important one concerns decisions of the Social Security Administration on claims of old-age, survivors', and disability benefits, which are reviewable in the first instance by district courts with subsequent recourse to the courts of appeals.

The jurisdictional picture is less clear with respect to informal administrative action, both notice-and-comment rulemaking and nonrecord adjudication.

Some recent statutes provide specifically for review by courts of appeals of rules of general applicability promulgated without an evidentiary hearing. There is much uncertainty, and conflicting authority, as to whether older statutes providing for direct appellate review of agency orders apply to such rules. In the case of agencies not subject to specific court of appeals review provisions, rules are ordinarily reviewed by district courts under the general review provisions of the Administrative Procedure Act.

Orders entered after nonrecord adjudications by agencies whose orders generally are subject to court of appeals review typically are reviewed in the courts of appeals, although there is some old and more-or-less neglected authority that casts doubt on the practice. Orders of other agencies entered after nonrecord adjudications are reviewed in the district courts under the general review provisions of the Administrative Procedure Act.

Legislation that conformed to the criteria set forth in this recommendation would not significantly alter the pattern described above but would clarify the pattern at its edges. Such legislation would eliminate the uncertainty and consequent needless jurisdictional litigation that have resulted from the ambiguity of existing statutory review provisions in their application to informal agency actions, rules, and orders. It would have the additional desirable effect, particularly important now because of the acute and increasing caseload pressure on the courts of appeals, of helping to avoid burdening these courts with administrative review cases that are less suitable for them than others.

This recommendation rests on three basic premises. First, direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system. The classic case for the courts of appeals is review of agency action taken on an evidentiary record. A second premise, however, is that direct review by the courts of appeals is not necessarily rendered unfeasible by the absence of such a record; the records generated by the processes of notice-and-comment rule-making and of informal adjudication are frequently adequate to the purpose of judicial review and, also, can usually be supplemented without the necessity of a judicial trial. The third, and qualifying, premise is that review by the courts of appeals, even when review is of a purely appellate nature, or, if not so, can feasibly be conducted by the courts of appeals, is not invariably desirable. The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact; administrative review cases that do not present such issues and that would not ordinarily reach the courts of appeals unless brought there initially should be assigned instead to the district courts.

Before the study on which the recommendation is based was made the Conference necessarily passed upon particular questions of choice-of-forum for judicial review in connection with individual studies and the recommendations emanating therefrom. Instances are Recommendations 72–6 (court of appeals review of civil money penalties prescribed on a record); 72–7 (district court review of non-record

selective service preinduction orders); 74–3 (court of appeals review of mining claims decided on a record). The Conference has not caused these recommendations to be restudied in the light of the new criteria but believes that the recommendations remain appropriate.

Recommendation

1. Adjudications based on trial-type hearings and rules required by statute to be based on a hearing with a determination on the record should generally be made directly reviewable by courts of appeals. For certain types of formal administrative action, however, initial district-court review may be appropriate in the interest of conserving the scarce and overextended resources of the Federal appellate system. The district court should not be interposed unless the administrative action to be reviewed is of a type: (*a*) That rarely involves issues of law or of broad social or economic impact warranting routine review by a multimember court, and (*b*) such that district court review would significantly reduce the workload of the appellate courts. The latter condition is met only where the class of orders to be reviewed is numerous and, if reviewed initially by district courts, would infrequently give rise to further appeal.

2. For any class of formal administrative action that, even after initial district-court review, generates a large and burdensome volume of appeals, only a small proportion of which involve legal issues or issues of broad social or economic impact, Congress should consider the advisability of making appeals discretionary or of allowing appeals only upon certification by the district court. Under a system of discretionary appeals, leave to appeal, either by the agency or by an aggrieved party, should be granted only in cases where issues of law or of broad impact are involved.

3. Orders of the Social Security Administration with respect to claims for disability, health insurance, retirement, or survivors' benefits should continue to be reviewed in the first instance by district courts. If the volume of social security appeals increases as dramatically as projected, Congress should consider the advisability of placing appellate review on a discretionary basis.

4. Orders of the Department of Labor Benefits Review Board with respect to black-lung compensation claims under the Black Lung Act of 1972 are now subject to direct review by courts of appeals in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Congress should consider the advisability of providing for initial district-court review of such orders.

5. The appropriate forum for the review of rules promulugated pursuant to the notice-and-comment procedures of 5 U.S.C. § 553 should be determined in the light of the following considerations:

(*a*) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts

of appeals because: (*i*) compliance with procedural requirements of U.S.C. § 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review, and (*ii*) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(*b*) Direct review by a court of appeals is appropriate whenever: (*i*) an initial district court decision respecting the validity of a rule will ordinarily be appealed; or (*ii*) the public interest requires prompt, authoritative determination of the validity of the rule.

(*c*) Rules issued by agencies that regularly engage in formal adjudication and whose orders are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (*b*) above and in any event should be reviewable directly by the courts of appeals.

(*d*) Rules of other agencies that do not satisfy the criteria of (*b*) above should generally be reviewable in the first instance by the district courts.

6. (*a*) Informal administrative actions, other than rules, should generally be reviewable in the first instance by the district courts.

(*b*) The court of appeals is the appropriate reviewing forum for informal actions that, as a class, fulfill all of the following conditions:

(*i*) Typically involve issues of law or of broad social or economic impact;

(*ii*) Typically do not require an evidentiary trial at the judicial level to determine either the underlying facts or the grounds or evidence on which the agency based its action; and

(*iii*) Are either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually if reviewed initially by district courts. Informal orders issued by agencies that mainly engage in formal adjudication and the formal orders of which are now subject by statute to direct review by the courts of appeals will normally satisfy these conditions and should therefore be reviewable by the courts of appeals. There is, however, at least one exception. Informal, discretionary orders of immigration officials related to deportation, but not issued as part of any formal deportation proceeding, should continue to be reviewable in the first instance by the district courts.

7. Statutes that give courts of appeals jurisdiction to review informal orders or rules should contain provisions, similar to that now contained in the Administrative Orders Review Act, 28 U.S.C. § 2347,

authorizing transfer of proceedings to a district court where a factual issue requiring a judical trial is presented.

8. A Federal court which determines that it does not have jurisdiction of a judicial review proceeding should be authorized to transfer the proceeding, in the interests of justice and expedition, to a Federal court appearing to have jurisdiction.

Separate Statement of Malcolm S. Mason and Robert L. Trachtenberg

This is, we believe, the first time the Conference has chosen to make an important recommendation without obtaining in advance the views of the agency most affected and best informed. Paragraph 3 of the recommendation deals specifically with review of Social Security cases. Paragraphs 1 and 2 are more general, but the discussion focused primarily on Social Security cases and did not have the benefit of specific comment by the Social Security Administration.

In a recent 4-week period that seems representative, over 95 percent of the litigated Social Security cases turned on factual issues of disability. The other 5 percent turn on issues of law often of constitutional dimension; as to these it is neither desirable nor useful that the review process be encumbered by a screening at district court or appeal court level.

The disability fact cases come to the courts under a substantial evidence test with the benefit of analysis by several levels of agency staff, an administrative law judge and possible appeals council review of factfindings on which the agency at several levels and a district court have concurred; the likelihood of reversal is extremely small. In the few cases in which the agency appeals, it is, by set policy, seeking review of a case in which there is an issue of broad consequence and in which there is a conflict between a conclusion of the agency at several levels of administration and a district court; the likelihood of reversal is presumably increased.

The proposal for appeal limited by discretion of the appeal court, or worse, by the district court, is bad in principle and probably unnecessary. If considered at all it should be viewed with due attention to these principal differences. Despite large volume, appellate review is ordinarily as quick and undemanding as a discretionary screening would be. The multitiered appeal process has had a beneficial effect on the program.

We believe that section 3, should have been deleted, particularly sentence 2 of section 3 and sections 1 and 2 should have been reconsidered in the light of that deletion to avoid reliance on impressions about Social Security cases without the benefit of such guidance as advance consultation with the agency might have given.

RECOMMENDATION 75-4

PROCEDURES TO INSURE COMPLIANCE BY FEDERAL FACILITIES WITH ENVIRONMENTAL QUALITY STANDARDS

(Adopted June 5-6, 1975)

The Federal Government owns or operates over 20,000 facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish hatcheries, Coast Guard stations and research laboratories. All of these facilities are required by Federal laws to comply with environmental quality standards established by National, State, or local law.

As part of the Federal environmental protection program, a 1973 Executive order directs Federal agencies to assess their pollution control needs, develop plans for improvement and submit those plans and necessary budget requests for inclusion in the President's annual budget. This program has achieved significant results. Approximately $2.4 billion has been expended over the past eight years to improve and install pollution abatement equipment at Federal facilities. Nonetheless, instances of noncompliance by Federal facilities have persisted. Moreover, there are wide variations among the respective programs concerned with air, water, noise, solid waste, and ocean dumping, in the openness and effectiveness of the procedures for securing Federal facility compliance.

The Clean Air Act, the Federal Water Pollution Control Act, and the Noise Control Act each require agencies with control over Federal facilities to comply with both Federal and non-Federal pollution control standards "to the same extent (as) any person," unless otherwise exempted by statute. The Marine Protection Act requires all persons, including Federal officials, to obtain a Federal permit before dumping waste material in the ocean. Under the Solid Waste Disposal Act, Federal agencies need comply only with the U.S. Environmental Protection Agency's guidelines, which are less stringent than those of some States and localities.

The Federal air, water, noise control, and solid waste statutes do not establish or specifically authorize procedures for their enforcement where Federal facilities are concerned. This problem is acute when considering non-Federal environmental quality standards, which constitute the bulk of the environmental standards Federal facilities must meet, because the non-Federal efforts to impose their enforcement procedures have been challenged by Federal agencies. Two U.S. Courts of Appeals have reached opposite conclusions concerning the authority of States to require Federal facilities to obtain air emission control permits required of all non-Federal sources of air pollution; a third court of appeals has held that Federal facilities must comply

with State permit requirements with respect to water quality. But any decision, even of the Supreme Court, will leave substantial procedural problems. If the authority of the States to impose their permit and other enforcement procedures upon Federal facilities is upheld, some agencies will have to comply with a multitude of different State and local procedures. Because of the insufficiencies of the statutory provisions, a result denying such authority to the States, would leave only the present fragmentary and ineffective Federal procedures to insure the compliance of Federal facilities with environmental quality standards.

Recommendation

1. (*a*) The Clean Air Act, the Noise Control Act, and the Federal Water Pollution Control Act should be amended to vest in a single Federal agency the exclusive authority to develop and administer procedures to insure compliance by Federal facilities with non-Federal environmental quality standards. That agency should consider the use of emission control permits where they are not now employed.

(*b*) If the Congress amends the Solid Waste Disposal Act to require that Federal facilities comply with non-Federal environmental quality standards, the amendment should vest in the single Federal agency referred to in paragraph (*a*) the exclusive authority to develop and administer procedures for compliance with such standards by Federal facilities.

2. Procedures employed to insure compliance by Federal facilities with State, interstate, and local environmental quality standards should provide for: (*i*) local public notice and notice to local officials; (*ii*) opportunity for a public hearing (but not for a trial-type hearing except on issues of specific fact that the agency finds may best be resolved by trial-type hearing); and (*iii*) authority for the presiding officer at any such hearing to make recommendations concerning compliance.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON STRENGTHENING REGULATORY AGENCY MANAGEMENT THROUGH SEMINARS FOR AGENCY OFFICIALS

(Adopted June 5–6, 1975)

In pursuance of its continuing concern with the effective management of collegial regulatory agencies,[1] the Conference approves the following statement.

(1) In multimember regulatory agencies, the division of collegial responsibilities makes agency management unusually com-

[1] See Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization, adopted May 7, 1971.

plex. The working relationships in a collegial setting involving chairmen, members, and top staff are unique in a number of respects. They are foreign to the dominant experience of many who find themselves involved in them. Previously learned ways of doing things must be undone and new knowledge forged from experience.

(2) The objectives of prior efforts to strengthen the managerial role of the chairmen of collegial agencies have largely been realized. Although the preeminence of chairmen in the management realm is generally established, there remains some ambiguity in their role in relation to the role of members. This condition frequently results in some underlying tension in chairman-member relationships. But differences are seldom openly articulated and worked through. When differences arise, they are likely to appear in the context of particular issues, and not in a way that provokes attention to general questions about working relationships.

(3) Chairmen, though thrust into a more active managerial role than other agency members, sometimes seem unenthusiastic about management-related matters and have had limited preparation for this aspect of their responsibilities. Other agency members, who in a broad sense are ultimately charged with responsibility for management, likewise often appear to lack interest in management matters, such as setting regulatory priorities and resource allocations. As a result, there is little focused attention given at the top of the agencies to the larger management questions and particularly to the nature and viability of the processes through which major management-determinations are made.

(4) Although differences among agencies must be recognized fully in treating problems of regulatory management, there are certain commonalities. Even if experiences are not always directly transferable, there will be positive effects that result from their exchange. Yet there has been very little systematic communication among the agencies, especially at the level of chairmen and commissioners.

(5) Well-planned and adeptly conducted seminars are uniquely suited to developing perspectives and understandings related to the roles of chairmen and members, stimulating interest in particular problem areas, suggesting approaches to problem-solving, and exchanging information about organizational performance. The value of such endeavors has been demonstrated through a number of programs aimed at groups of officials not unlike regulatory officials. New Members of Congress participate in such enterprises. And the seminars regularly conducted for members of the Federal judiciary by the Federal Judicial Center are especially relevant. Regulatory

agency performance thus should be improved by affording agency members the opportunity to participate in seminars at which they can exchange views with officials of other agencies on management problems, alternative and innovative approaches to policy formulation, intraagency and interagency and governmental relationships, and methods of dealing with the complex role questions presented when regulatory problems are administered in a collegial setting.

(6) In exercise of its statutory authority to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure," the Administrative Conference should arrange for the conduct of periodic seminars for regulatory agency officials. Participants should be drawn principally from among the chairmen, members, and senior staff of the independent regulatory agencies, and the agencies should cooperate in arranging their participation. In the seminars, special emphasis should be placed on the interests and needs of officials who are newly appointed to their positions. The seminars should deal with matters basic to agency performance, such as budget and personnel policies and procedures; priority setting; relationships with Congress, departments and agencies, and the Executive Office of the President; and the implications of the Administrative Procedure Act for the management of regulatory programs.

(7) The seminars should be scheduled at the discretion of the Chairman of the Administrative Conference. The participating agencies should play a role in planning the seminars, as should the U.S. Civil Service Commission. The seminar format should be flexible and should emphasize informal problem-oriented group discussion, with expert informational inputs as necessary, rather than formal presentations. Reliance should be placed on the participants themselves and on others experienced in the regulatory process, including former members and chairmen. Each seminar should be evaluated by the participants as an aid to improving subsequent efforts.

Recommendation 75–5

INTERNAL REVENUE SERVICE PROCEDURES: THE AUDIT AND SETTLEMENT PROCESSES

(Adopted December 11–12, 1975)

(a) *Individual agent's requisition of returns of audit.* The Internal Revenue Service should amend its procedures whereby an examining officer requisitions a tax return for the purpose of audit. The procedures should assure that the examining officer will make an adequate written explanation of his need to have the file, and that such explanation accompany the requisition and be reviewed by the requesting officer's Group Manager. For returns that are requisitioned for

reasons so routine as to make detailed written explanation unnecessary, however, a code number designating the reason for selection in each case should suffice. The categories of routine reasons for requisition should be specifically and narrowly defined in the Internal Revenue Manual.

(b) *Notification of reasons for selection for audit.* (1) Each individual taxpayer should be given, at the time he is notified of the selection of his return for audit, a brief written statement of the selection program or other criterion on the basis of which his return was selected for audit. To the extent feasible, the selection of returns for audit should be made pursuant to programs and criteria established in advance.

(2) The Internal Revenue Service should annually publish statistics, by income level, showing the number of returns examined, the results of the examinations, and other pertinent information, for each of its selection programs and criteria.

(c) *Repetitive audits.* The Internal Revenue Service should establish the following procedures to be observed with respect to an individual who has undergone one or more audits with respect to the three preceding taxable years resulting in no change or only small change in his tax liability:

(1) The district office's Returns Program Manager should not assign that individual's return to an audit group unless it is accompanied by an adequate file reflecting such recent audit experience.

(2) Before contacting the taxpayer, the Group Manager and the examining officer should carefully review the current return in light of the taxpayer's past audit history to determine whether the issues presented by the current return are similar to those of prior audits. If they are, the current year's return should not be further examined unless there is compelling reason to believe that a substantial tax change will result.

(3) When it is decided that the return should be further examined, then, before the examining officer commences his review of the taxpayer's books and records, the taxpayer should be informed in writing that he may inquire about the necessity for this repetitive audit.

Taxpayer Compliance Measurement Program (TCMP) audits should not be subject to the foregoing procedures.

(d) *Review of audit selection.* The Internal Revenue Service should carry out a systematic ongoing evaluation of its selection of taxpayers' returns for audit. It should at a minimum maintain procedures whereby the reasons for audit selection, as indicated by Service personnel on Forms 1247 (Examination Record) or 4298 (Audit Requisition and Information Report), can be verified for appro-

priateness and accuracy. The procedures established should be sufficient to enable the Joint Committee on Internal Revenue Taxation or other Congressional oversight body to obtain listings of all or a specified portion of the returns selected for audit, identified by any of the following characteristics: Taxpayer name and identification number; return document locator number; specific (coded) reason for selection; year for which return was filed; date of audit selection; and date of audit completion.

(e) *Staffing for TCMP audits.* To minimize the time of taxpayers and of Service personnel devoted to the income tax aspects of the Taxpayer Compliance Measurement Program (TCMP), the Internal Revenue Service should select from among its most capable and experienced Revenue Agents and Tax Auditors the personnel to conduct TCMP income tax audits and related research projects.

(f) *Advice to taxpayers regarding retention of records.* The Internal Revenue Service should annually endeavor to inform each taxpayer: (1) that an audit of his return, should there be one, will not likely commence for some period of time after the return has been filed; (2) that the taxpayer should retain, for use in case of audit, a copy of his return and all records which support the return for at least three years following the time fixed by law for its filing; and (3) that his receipt of a refund, based on the calculations in the tax return, does not preclude audit of that return at a later time. This recommendation could be fulfilled, for example, by presenting such information prominently in the Commissioner's annual message or elsewhere in the instruction materials accompanying the forms mailed to taxpayers.

(*g*) *Measurement and promotion of voluntary compliance.* The Internal Revenue Service should seek funds from the Congress to undertake studies to evaluate the effectiveness of methods to measure and promote voluntary compliance with the tax laws of the United States. Such inquiries should include consideration of return selection methods, audit procedures, collection procedures, programs for the education of taxpayers, and taxpayer assistance services.

(*h*) *Analysis of recovery experience.* The Internal Revenue Service should periodically publish a comparative study, for each taxpayer class, of a representative sample of District and Appellate Conference settlements involving the most commonly controverted issues. The study should include comparison and analysis of the recovery ratio (i.e., the ratio of the amount of deficiency agreed upon by the parties to the amount of deficiency originally recommended by the examining officer), with reference to the factors of: (1) amounts of tax involved; (2) whether or not the taxpayers were represented; and (3) patterns of geographic variation.

RECOMMENDATION 75-6

INTERNAL REVENUE SERVICE PROCEDURES: COLLECTION OF DELINQUENT TAXES

(Adopted December 11-12, 1975)

(a) *Notices mailed to delinquent taxpayers.* The Internal Revenue Service should revise its methods of notifying taxpayers of the application of forcible collection powers to collect delinquent accounts:

(1) The Service should experiment with sending its Final Notice Before Seizure by certified mail, return receipt requested, before forcible collection action is initiated.

(2) The Final Notice Before Seizure should be revised to indicate that forcible action may be taken at any time after the expiration of ten days from date of the Notice and to emphasize that such action may thereafter be taken without further notice to the taxpayer.

(3) If no levy or seizure action is initiated after an unusually long interval, such as 120 days, after the date of a Final Notice Before Seizure, the District Office should undertake additional actual notification to the taxpayer that levy or seizure will follow promptly, but not sooner than ten days thereafter. Such additional notification should be attempted by telephone or personal contact, and if no contact is established, by certified mail, return receipt requested.

(b) *Income tax liens.* In connection with the recording or filing of income tax liens, the Internal Revenue Service should establish and promulgate in the Internal Revenue Manual:

(1) Factors to be considered in determining whether such liens are to be recorded or filed;

(2) Procedures to ensure, to the extent feasible, that the taxpayer is notified of the recording or filing of such lien against his property; and

(3) Procedures to ensure, without the necessity of application by the taxpayer, that upon payment or satisfaction of a delinquent account, a release of such lien is properly recorded or filed in all places where notice of such lien was recorded or filed.

(c) *Levies on liquid assets.* (1) The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual affirmative and specific guidelines for resort to levies on liquid assets (in addition to specifying, as it now does, when these powers should not be used) in order to achieve fair and evenhanded application thereof. In formulating such guidelines, the Service should by illustration seek to specify the circumstances in which the debtor is provided a "reasonable" opportunity to pay the tax and which constitute "judicious" use of the levy powers.

(2) In order to reduce the possibility of undue or unanticipated hardship to delinquent taxpayers against whom salary or wage levies are imposed, legislation should be enacted to exempt from levy a minimum amount of the taxpayer's salary or wages, such amount to be based in part upon the number of dependents of the taxpayer. Such legislation should also provide that a levy on salary or wages of a taxpayer be continuous from the date the levy is first made until the tax liability with respect to which it is made is satisfied or becomes unenforceable because of the lapse of time.

(d) *Seizures and sales of nonliquid assets.* (1) The Internal Revenue Service should establish the following procedures to ensure that the taxpayer is injured as little as possible by the seizure and sale of nonliquid assets, consistent with collection of the delinquent taxes:

(i) Withdrawal from Revenue Officers and delegation only to Group Managers of the authority to determine that seizure will be imposed;

(ii) Determination by the Group Manager, prior to imposition of the seizure, that the proceeds of sale of the seized assets will exceed the anticipated expenses of sale;

(iii) Return to the taxpayer of any item of property as to which a determination can reasonably be made that the minimum sale price is unlikely to exceed the Service's expenses of seizure and sale.

(2) To provide qualitative information concerning seizures and sales of nonliquid assets, the Internal Revenue Service should from time to time collect, tabulate, and analyze data on:

(i) The number of seizures, as it now does;

(ii) The number of sales;

(iii) The gross proceeds from sales;

(iv) The funds applied in reduction of tax liabilities;

(v) Personnel and other overhead costs incurred by the Service in the seizure and sale proceedings;

(vi) The number of releases back to the taxpayer of seized property; and

(vii) The reasons for such releases.

(e) *Undue hardship.* The Internal Revenue Service should continue to exempt from levy or seizure those taxpayers to whom undue hardship would result from such activity. However, the Service should establish and promulgate more specific criteria and procedures to make the application of the undue hardship principle more uniform. These should include:

(1) A listing of criteria for exempting funds sufficient for the purchase of common necessaries of life for the taxpayer and his dependents, including food, housing, transportation, and clothing;

(2) Clear advice as to what information and documentation is needed for the Service to make the determination of hardship; and

(3) Sufficient time and opportunity for the taxpayer to obtain the information and documentation necessary to complete and support the financial statement on which the determination will be based.

(*f*) *Installment payments of delinquent taxes.* The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual procedures to enable taxpayers to pay their delinquent accounts in installments in appropriate circumstances. The Service should endeavor to ensure that the monthly sum of installment payments required of the taxpayer towards liquidation of his delinquent account does not exceed the amount of the taxpayer's monthly take-home income less his monthly expenses for common necessaries of life. The Service should keep line personnel advised of the minimum acceptable installment in order that the costs to the Service from processing any such payments do not exceed the sum of any such payment. No payment agreement should be rejected solely because of the length of time it would require to satisfy the debt; however, waiver or extension of the statute of limitations for collection should be obtained if the time needed for payment will extend beyond the limitations period, and the agreement should be subject to at least annual review and adjustment to reflect changes, if any, in the taxpayer's ability to liquidate the unpaid delinquency. Finally, the Service should discontinue any reference to agreements for payment of delinquent taxes in periodic installments as "part payment" agreements because such terminology fosters the mistaken impression that a portion of the tax debt has been forgiven. The idiom of "part payment agreement" should be supplanted with such terms as "installment agreement," "periodic payments," or others which do not connote that less than the total delinquency is to be paid.

(g) *Jeopardy and termination assessments.* (1) In order to prevent abuse of the authority to make jeopardy and termination assessments, the Internal Revenue Service should establish and promulgate procedures that will enable the taxpayer to contest the necessity and amount of such assessments at the earliest possible time. The taxpayer should be furnished as soon as practicable after the assessment is made a full written explanation of the facts upon which (i) the District Director found that collection of a tax deficiency is or has been jeopardized; and (ii) the computation of tax was based (including the method of such computation). An informal conference should be granted at the taxpayer's request to resolve any dispute over the finding of jeopardy and computation. The investigating agents who

developed the facts upon which the finding of jeopardy and the computation of tax was based, and their supervisors, should ordinarily be in attendance at such a conference.

(2) In order to restrict the imposition of jeopardy and termination assessments to situations in which the eventual collection of tax is jeopardized, the Internal Revenue Service should remove the implication, now present in the Internal Revenue Manual, that jeopardy or termination assessments are justified merely by the existence of a "prima facie case" and make clear in the Manual that no such assessment may be imposed unless a determination has been made by the District Director, based on substantial evidence, that a tax is due and the eventual collection of the tax is jeopardized.

(3) The Internal Revenue Service should establish and promulgate in the Internal Revenue Manual procedures which will ensure immediate release to the taxpayer of any or all property distrained in jeopardy and termination proceedings in return for an adequate surety in the amount of the net proceeds expected to be realized on a forced sale of any or all such property the release of which is sought.

(h) *Employer tax payments.* To permit more prompt contact with defaulting business taxpayers, the Internal Revenue Service should speed its crediting of employer payments of withheld employee income and Social Security taxes by requiring commercial banks to forward records of such payments directly to an Internal Revenue Service Center, rather than to a Federal Reserve Bank.

(*i*) *Education of new employers.* The Internal Revenue Service should endeavor to give officers of new businesses written advice of their possible personal liability for payment of withheld employee taxes. This advice could be communicated individually to all such officers, whose names and addresses the Service could require to be submitted as part of the application for an employer identification number. Alternatively, the Service could send multiple copies of the advice letter to the new business entity, with the request that the copies be distributed to all officers. In either case the letter should invite the officer to discuss any questions with a Taxpayer Service Representative. When officers do respond and it is determined that there is a responsibility to pay and file returns of certain taxes, a follow-up contact should be made to ascertain that the responsibilities are understood and followed. Moreover, the Service should work with other Federal agencies to assure that the officers of new employer organizations being established with Federal financial assistance will become familiar with their responsibilities before they commence operations. Similar efforts, with the cooperation of parent organizations, should be made to contact and instruct franchisees and licensees of chain stores, food outlets, oil companies, and the like.

RECOMMENDATION 75-7

INTERNAL REVENUE SERVICE PROCEDURES: CIVIL PENALTIES

(Adopted December 11–12, 1975)

(a) *Analysis of Effectiveness of Civil Penalties.* The Internal Revenue Service should annually compile and publish, for each taxpayer class and by year of tax returns, statistical data, together with analytic discussions, pertaining to the assessment and collection of civil penalties for underpayment of tax due to each of the different types of conduct now or hereafter provided as the basis for such penalties. Such data should be compiled for the purpose of evaluating the significance, effectiveness, and fairness of these civil penalties and should include: (1) the number and dollar amounts of penalties assessed; (2) the number and dollar amounts of penalties voluntarily paid by taxpayers; (3) the number and dollar amounts of penalties contested by taxpayers; (4) the number and dollar amounts of penalties sustained by court action and collected. In addition to making such data and analyses available to the public and to the Congress, the Service should consider and determine whether additional data and analyses should be compiled and prepared pertaining to the significance, effectiveness, and fairness of these and other civil penalties from the standpoint of the administration of the tax laws by the Service, enforcement of the laws by the courts, and compliance with the laws by taxpayers.

(b) *Structure and Application of Civil Penalties for Underpayment of Tax.* Legislation should be enacted which would restructure and alter application of the civil penalties for underpayment of tax, established in Section 6653 of the Internal Revenue Code, as follows:

(1) (i) The penalty for "negligence" should be retained. Negligence should be defined as failure to exercise reasonable care in keeping records or in preparing the tax return.

(ii) A taxpayer against whom this penalty is assessed should have the burden of proof to establish by a preponderance of the evidence that his conduct was not negligent.

(2) The present five percent penalty for "intentional disregard of rules and regulations (but without intention to defraud)" should be repealed.

(3) (i) A new penalty should be established for "reckless or intentional conduct (but without willful attempt to evade payment of tax)." The rate of this penalty should be fixed at a level near the midpoint (say 25%) between the rates of the penalties for negligence (now 5%) and for willful attempts to evade payment of tax (now 50%). Reckless conduct should be defined as meaning that in keeping records or preparing the tax return, the

taxpayer has consciously disregarded a substantial risk that an underpayment would occur; provided, that it is not intended that the penalty to be established pursuant to this paragraph would apply to an underpayment resulting from a bona fide disagreement with the Internal Revenue Service as to the interpretation of the tax law or its application to facts disclosed on a tax return. Intentional conduct should be defined as meaning that in keeping records or preparing the tax return, the taxpayer knew that an underpayment would occur or was substantially certain to occur.

(ii) A taxpayer against whom this penalty is assessed should have the burden of proof to establish by a preponderance of the evidence that his conduct was not reckless or intentional. In any case where the taxpayer succeeds in persuading the court that his conduct was not reckless or intentional, the court should be empowered to impose the lesser penalty for negligence, even though it had not theretofore been assessed by the Internal Revenue Service.

(4) (i) The present 50 percent penalty for "fraud" should be restated to apply only to "willful attempt to evade payment of tax," which should be understood to have the same meaning as under Section 7201 of the Internal Revenue Code.

(ii) The Internal Revenue Service should have the burden of proof to establish by clear and convincing evidence that an underpayment is attributable to the taxpayer's willful attempt to evade payment of tax. If the Service succeeds in persuading the court that a part of the underpayment is so attributable, the burden of proof should shift to the taxpayer to establish by a preponderance of the evidence that the remainder of the underpayment is not so attributable. In any case where the court is not persuaded that the taxpayer engaged in a willful attempt to evade payment of tax, the court should be empowered to impose the penalty for reckless or intentional conduct (proposed in c. above) or the penalty for negligence, provided that, before the court may impose either of such lesser penalties, the Service shall have so proposed and the taxpayer shall have had the opportunity to present evidence to establish that he is not liable therefor.

(5) In imposing the penalties for underpayment of taxes described above, each penalty rate should be applied only to the portion of the total underpayment that is attributable to conduct liable for penalty at such rate.

(c) *Publicity of Civil Penalty for Underpayment of Tax Because of Fraud.* The Internal Revenue Service should seek statutory instruction with respect to publicizing the imposition of the 50 percent civil penalty for underpayment of tax because of fraud (or, as recom-

mended in paragraph (b)(4) of this section, restated as "willful attempt to evade payment of tax").[1]

(d) *Structure and Application of Civil Penalties for Failure to File Tax Return or to Pay Tax.* (1) Legislation should be enacted which would restructure and alter application of the civil penalties for failure to file a tax return or to pay a tax, established in Section 6651 of the Internal Revenue Code, as follows:

(i) The phrase "and not due to willful neglect" should be deleted from paragraphs (1), (2), and (3) of subsection 6651(a).

(ii) (A) The monthly rate of the penalty for failure to file a return, established in subsection 6651(a)(1), should be modified so as to extend the time period of lateness in filing a return which must elapse before the rate of penalty to be applied reaches the present aggregate maximum rate of 25 percent. The table below sets forth three options for so modifying the monthly penalty rate, compared with present law.

	Penalty for first month (percent)	Penalty for each succeeding month (percent)	Period of lateness to reach maximum penalty (months)
Present law	5	5	5
Option 1	5	2	11
Option 2	5	1¼	16
Option 3	5	1	21

The penalty for failure to pay tax established by subsection 6651(a)(2) should be imposed in addition to, and not offset against, the foregoing penalty.

(B) The monthly rate of the penalty for each month after the first month of failure to file a return should be prorated on a semi-monthly basis.

(2) The Internal Revenue Service should set forth, in the regulations under Section 6651 of the Internal Revenue Code, or in other form readily available to the public, the listing of acceptable reasons for late filing of a tax return that are set forth in the Internal Revenue Manual.

(e) *Procedures for Appealing Civil Penalties for Failure to File Tax Return or to Pay Tax.* With regard to civil penalties for failure to file a tax return or to pay tax established in Section 6651 of the Internal Revenue Code, taxpayers should be accorded administrative settlement procedures and the right to Tax Court review similar to those accorded with regard to civil penalties for underpayment of tax established in Section 6653 of the Code.

[1] Issuance of such publicity should be carried out in a manner consistent with Conference Recommendation 73-1, Adverse Agency Publicity.

RECOMMENDATION 75-8

INTERNAL REVENUE SERVICE PROCEDURES: TAX RETURN CONFIDENTIALITY

(Adopted December 11-12, 1975)

(a) *Purpose and Scope of Application of Recommendations.* (1) Under existing law, tax returns are disclosed by the Internal Revenue Service for many purposes to many governmental agencies outside the Internal Revenue Service. The purpose of these recommendations is substantially to narrow the authority of the Service to disclose to other governmental agencies tax returns pertaining to the tax liability of individuals and decedents, including principally individual income tax returns (Forms 1040 and 1040A), estate tax returns (Form 706), gift tax returns (Form 709), and income tax returns filed on behalf of estates or trusts (Form 1041). Tax returns of business entities such as partnerships and corporations, even though they may have bearing on the tax liability of individuals, are outside the scope of these recommendations. The omission of such other tax returns from the scope of application of these recommendations is intended to reflect neither approval nor disapproval of existing law or of the disclosure practices of the Internal Revenue Service thereunder, with respect to such other tax returns. But Congress, in addressing the subject of tax return confidentiality should make provision to govern the confidentiality and conditions of disclosure of all categories of tax returns, including categories that are outside the scope of these recommendations.

(2) As used in these recommendations, the term "tax return" means (i) the return itself together with any schedule, list, and other written statement filed by or on behalf of the taxpayer with the Internal Revenue Service which is designed to be supplemental to or become a part of the return, and (ii) other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included in paragraph (a)(2)(i) of this section.[1]

(b) *General.* Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service only as authorized by express statute designating the persons to whom and the purposes for which disclosure may be made, the procedures governing such disclosure, and limitations on use or redisclosure that shall govern such disclosure.

(c) *Availability of Tax Returns to Executive Departments and Agencies.* (1) Legislation should be enacted which would permit the disclosure

[1] This definition is taken from Treasury Regulation § 301.6103(a)-1(3)(i). In considering any legislation in this area, Congress should consider the adequacy of this definition, since some technical problems may exist under the present regulation.

by the Internal Revenue Service of tax returns to any Executive department or agency of the Federal government in the following circumstances:

(i) To any office of the Treasury Department for use that is necessary to its exercise of responsibility for the administration of the tax laws, the formulation of tax policy, or the preparation of economic analyses.

(ii) To a United States Attorney, or to an attorney of the Department of Justice, for use in preparing for and conducting civil or criminal litigation that is related to administration of the tax laws, provided, that any such disclosure, shall be limited to (A) the tax return of the taxpayer who is a party to the litigation, (B) the tax return of an alleged co-conspirator of such party, and (C) the tax return of any other taxpayer which contains information that is pertinent to an issue on the litigation, and provided further, that when any such disclosure is to be made in response to a request initiated by any such attorney, the request shall be in writing and state with specificity the reasons for seeking the tax return.

(iii) To the Bureau of the Census and to the Bureau of Economic Analysis of the Department of Commerce for use that is necessary to their respective statistical collection and publication responsibilities.

(iv) To the Social Security Administration for use that is necessary to its responsibility for administering the Social Security Act.

(v) To the Department of Labor and to the Pension Benefit Guaranty Corporation for use that is necessary to their respective responsibilities for administering the Employee Retirement Income Security Act.

Particularly, the Internal Revenue Service should not be permitted to disclose tax return information to any Executive department or agency of the Federal government for use in any way relating to an individual's service as a juror. [The Conference defers consideration of whether, and under what circumstances, tax returns should be disclosed to Executive departments or agencies of the Federal government for use in litigation or investigations not related to the administration of the tax laws.]

(2) Any disclosure in a form that allows identification of the taxpayer should be made only if the agency or department to which disclosure is made follows procedures based on legally enforceable regulations no less restrictive than those of the Internal Revenue Service which are designed to assure that the tax return will not be used or redisclosed for any purpose other than that for which such disclosure is made.

(d) *Availability of Tax Returns to the Executive Office of the President.* (1) Legislation should be enacted which would permit the disclosure of tax returns by the Internal Revenue Service to the Executive Office of the President, only in accordance with the following limitations:

(i) The President shall personally sign a written request for such disclosure which (A) specifies the taxpayer's tax return to be disclosed; (B) designates by name a responsible individual to whom disclosure is to be made; (C) states with specificity the reasons for seeking the tax return and the uses to which it will be put; and (D) states that the tax return requested will not be reproduced and will not be used or redisclosed for any use other than that for which disclosure is requested.

(ii) The requested tax return shall be furnished by the Internal Revenue Service only in written form and only to the President or to an individual designated in the request.

(iii) The written material furnished by the Internal Revenue Service shall be returned to the Service after the use for which it was requested has been completed.

(2) The Internal Revenue Service should maintain permanent records of all disclosures of tax returns to the Executive Office of the President, including copies of Presidential requests, the dates and reasons therefor, the individuals to whom disclosure is made, and the dates when materials furnished are returned to the Service. Based on such records, the Internal Revenue Service should prepare and submit an annual report to the committees of the Congress which are charged with responsibility for oversight of the administrative procedures of the Service, of the names of all taxpayers about whom information was disclosed, the reasons for which each disclosure was requested, and the names of all individuals to whom such disclosures were made.

(e) *Availability of Tax Returns to Committees of Congress.* The existing statutory authority (Section 6103(d) of the Internal Revenue Code) for the Senate Committee on Finance, and the Joint Committee on Internal Revenue Taxation should be continued. Disclosure of tax returns by the Internal Revenue Service to any other committee of the House or Senate, or joint committee of the Congress, should only be in accordance with specific authorization for such disclosure by a resolution of the House or Senate or, in the case of a joint committee, by a concurrent resolution.

(f) *Availability of Tax Returns to States.* (1) Legislation should be enacted which would amend Section 6103(b) of the Internal Revenue Code by providing the following additional limitations on the right of any State official, body, or commission to inspect tax returns:

(i) The State shall have enacted a statute, which the Commissioner of Internal Revenue has determined to be substantially similar to paragraph (2) of Section 7213 of the

Internal Revenue Code, making it a crime for any officer, employee, or agent of the State, or of any political subdivision thereof, to disclose any information acquired by him as a consequence of a disclosure made by the Internal Revenue Service pursuant to Section 6103(b) of the Internal Revenue Code.

(ii) The State shall have entered into, and shall fully comply with, an agreement with the Internal Revenue Service by which the State is obligated to adopt legally enforceable regulations and procedures to safeguard the confidentiality of tax returns which are determined by the Internal Revenue Service to provide satisfactory assurance that (A) information disclosed by the Service to the State, pursuant to Section 6103(b) of the Internal Revenue Code, and (B) information, submitted by a taxpayer to the State or local tax authorities, which is the same as or substantially similar to that compiled for submission with the taxpayer's federal income tax return, will be used or disclosed only within the limitations therein provided.

(2) The Internal Revenue Service should adopt regulations which shall contain provisions to accomplish the following:

(i) Establish procedures whereby (A) the Service will make the determination that a State has enacted a statute that is substantially similar to paragraph (2) of Section 7213 of the Internal Revenue Code, and (B) the Service will monitor the State's enforcement of such statute;

(ii) Establish criteria that will be applied by the Service in making determinations regarding the sufficiency of State regulations and procedures designed to limit use and redisclosure of information to be disclosed pursuant to Section 6103(b) of the Internal Revenue Code;

(iii) Establish criteria that will be applied by the Service in acting upon requests for disclosure of information pursuant to Section 6103(b) of the Internal Revenue Code; and

(iv) Establish procedures whereby the Service will audit and enforce the performance by the States of their obligations provided in agreements entered into as a condition of obtaining disclosure of information pursuant to Section 6103(b) of the Internal Revenue Code, including a procedure for suspending disclosure of information to a State under Section 6103(b) whenever the Service determines that the State has failed to perform any of its obligations provided in such agreement.

(g) *Requisition of Tax Returns by Service Personnel.* The Internal Revenue Service should strengthen its procedures designed to eliminate unnecessary inspection of tax returns by Service employees. Such procedures should provide for (1) periodic monitoring by Service management of the requisitioning of tax returns by Service employees,

(2) preparation and maintenance of statistical records designed to reveal patterns of frequency in, and of reasons for, the requisitioning of tax returns by Service employees, and (3) preservation of the documents employed by Service employees to requisition tax returns by incorporating each such document in the permanent file of the return requisitioned thereby.

(h) *Notice to the Public About Tax Return Disclosures.* The Internal Revenue Service should inform each taxpayer, by means of a concise statement in the tax return or other appropriate place, of the disclosure, for uses unrelated to the administration of Federal tax laws, that may be made of information supplied by the taxpayer in the return. Such statement should include reference to a public document, which should be prepared and disseminated by the Service, which identifies the governmental agencies and other persons to which disclosures of tax returns are made and the purposes for such disclosures, and which fully describes the procedures followed by the Service with respect to the disclosure of tax returns.[2]

Recommendation 75–9
Internal Revenue Service Procedures: Taxpayer Services and Complaints

(Adopted December 11–12, 1975)

(a) *Separate Accounting for Taxpayer Service Functions.* The Internal Revenue Service should, on a basis consistent from year to year, compile data on all personnel and funds allocated to and utilized in the performance of functions by its Taxpayer Service Division. Such data should be broken down, perhaps on the basis of statistical sampling, for each of the major types of taxpayer service provided, with attention to at least the following functions:

(1) Responding to individual inquiries and requests for assistance regarding administrative and operating procedures of the Service which have an impact on particular taxpayers;

(2) Answering individual inquiries for tax law advice and providing assistance in tax return preparation; and

(3) General education of members of the public about the tax laws, their tax-return-filing and tax-payment responsibilities, and the administrative and operating procedures of the Service.

(b) *Taxpayer Services.* The Internal Revenue Service should consider establishing a procedure whereby taxpayer inquiries and requests for assistance can be promptly screened and referred for response to Service personnel selected on the basis of their competence and

[2] This recommendation might be implemented by amplification of the Privacy Act notification provided with the 1975 income tax returns.

authority to respond to particular categories of inquiry or assistance. Such a screening and referral system might be facilitated by:

(1) Developing statistical profiles of the categories of inquiry and requests for assistance that are most frequently made;

(2) Specifically training and assigning some personnel to review taxpayer inquiries and requests for assistance and to make referral of them to those Service personnel whose competence and authority will assure prompt and effective responses;

(3) Specifically training some personnel as specialists in the administrative and operating procedures of the Internal Revenue Service, with emphasis on the operation of Service Centers, to whom referral of inquiries and requests for assistance will be made;

(4) Continuing to make available experienced and knowledgeable Audit Division personnel to whom referrals of inquiries and requests for assistance may be made, especially during tax-return-filing season; and

(5) Continuing to maintain high quality staffing of taxpayer contact units in the Service Centers until some workable alternative thereto is developed.

(c) *Tax Law Advice to Taxpayers.* The Internal Revenue Service should adopt procedures designed to assure that any taxpayer who inquires for tax law advice from any employee of the IRS Taxpayer Service Division will be informed that: (1) the answer to his inquiry is based on the facts understood by the employee and that such understanding may not be identical to, nor as comprehensive as, the taxpayer's; (2) the Service is not bound by the advice given by the employee and may assert a different position at some later date, for example, if the taxpayer's return is audited; (3) the advice given by the employee is based on the Service's interpretation of the tax laws and, if such be the case with respect to a particular inquiry, that there is authority for a different interpretaton as to which the taxpayer should seek his own tax law advice; and (4) the taxpayer should preserve any records pertaining to the subject matter of the inquiry for at least three years following the time fixed by law for filing the tax return to which the inquiry pertains. The substance of the foregoing information should be incorporated into all written materials issued by the Service describing the availability of taxpayer services or responding to inquiries for tax law advice. The substance of such information also should be mentioned in oral responses to inquiries for tax law advice, to the degree appropriate to the nature and circumstances of the contact.

(d) (1) *Taxpayer Complaint Response Procedures.* The Internal Revenue Service should establish regular procedures whereby any taxpayer can obtain a prompt and impartial response to any legitimate complaint about the conduct of any individual IRS employee. These

complaint response procedures should be organized and operated so as to provide for the receipt and processing of such complaints by Service personnel who have thorough familiarity with the authority, organization, and administrative and operating procedures of the Service.

(2) The recommended complaint response procedures should be well publicized and easily accessible to taxpayers through all IRS personnel, however organized and wherever situated, whose responsibilities include the provision of assistance, advice, or other services to taxpayers (for example, Taxpayer Service Representatives and personnel of Service Center Taxpayer Contact Units).

(3) The recommended complaint response procedures should be designed and operated so as to provide information that will enable the line management of the Service systematically to:

(i) Identify the causes of all legitimate complaints about the conduct of individual IRS employees;

(ii) Assess the effectiveness of the complaint response procedures from the standpoint of taxpayers; and

(iii) Determine what changes, consistent with the Service's duty to administer the internal revenue laws, may be necessary in the training, supervision, or assignment of Service personnel to eliminate causes of legitimate complaints about the conduct of individual IRS employees.

Recommendation 75–10

INTERNAL REVENUE SERVICE PROCEDURES: THE IRS SUMMONS POWER

(Adopted December 11–12, 1975)

(a) *Information on the Summons.* The Internal Revenue Service should revise its Summons form (Form 2039) to delete extraneous language and references to particular statutes, regulations, or fact situations, and to include, preferably on its face, and in a prominent position and type style:

(1) A brief and specific description of administrative procedures available to the summoned party for raising objections to the summons or to questions propounded at the appearance; and

(2) A statement that if the summoned party fails to comply with the summons or fails to answer questions propounded, the Service may seek a court order to compel compliance, and that where the summoned party fails to appear or otherwise to comply with the summons willfully and without legal excuse, he may be subject to contempt proceedings or criminal prosecution.

(b) *Notification to Taxpayer of Summons to Third Parties.* At the time a summons is served on a third party requesting testimony or production of documents, or as soon as feasible there-

after, the Internal Revenue Service should transmit a copy of such summons to the person to whom such testimony or documents relate.

(c) *Management Monitoring of Use of Summons.* To assure better oversight by its management of the use of the summons by its officers and employees, the Internal Revenue Service should prepare and maintain statistics and analyses for each taxpayer class, to the extent possible, comprising the following data:

(1) Number of summonses issued;

(2) Classifications of employees issuing summonses;

(3) Number of summonses with which there is voluntary compliance;

(4) Number of summonses with which there is not voluntary compliance and for which it is decided not to seek judicial enforcement, together with the reasons for such decisions; and

(5) Number of summonses with which there is not voluntary compliance and for which it is decided to seek enforcement, together with the reasons for such decisions, whether judicial enforcement is granted or denied, and the reasons for denial of enforcement.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE

As Revised May 31, 1974

SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, U.S.C. §§ 571 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers and duties of the Conference.

SECTION 2. MEMBERSHIP

(A) GENERAL

Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(B) TERMS OF NON-GOVERNMENT MEMBERS

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No more than ten percent of such members shall at any time be in continuous service beyond a third term.

(C) ELIGIBILITY AND REPLACEMENTS

(1) A member (other than a member of the Council) who is designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly, but not less than 30 days prior to the first session of the Conference at which such member shall sit, except that in exceptional circumstances

the Council may permit a newly designated or re-designated member to participate in any session.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(D) ALTERNATES

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, an alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee.

SECTION 3. COMMITTEES

The following shall constitute the standing committees of the Conference:

1. Committee on Agency Organization and Personnel;
2. Committee on Claims Adjudications;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grant and Benefit Programs;
5. Committee on Informal Action;
6. Committee on Judicial Review;
7. Committee on Licenses and Authorizations;
8. Committee on Ratemaking and Economic Regulation; and
9. Committee on Rulemaking and Public Information.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

SECTION 4. LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, and Federal agencies which are not represented on the Conference. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

Section 5. General

(A) MEETINGS

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(B) QUORUMS

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(C) SEPARATE STATEMENTS

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(D) AMENDMENT OF BYLAWS

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(E) PROCEDURE

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 89–554, September 6, 1966, 80 Stat. 388, as amended by Public Law 92–526 October 21, 1972, Title 5 U.S.C., Chapter 5, Subchapter III, Sections 571 through 576.]

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§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rulemaking, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575 (b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposals so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251–260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS–15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b);

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedures; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

There are authorized to be appropriated sums necessary not in excess of $760,000 for the fiscal year ending June 30, 1974, $805,000 for the fiscal year ending June 30, 1975, $850,000 for the fiscal year ending June 30, 1976, $900,000 for the fiscal year ending June 30, 1977, and $950,000 for the fiscal year ending June 30, 1978, and for each fiscal year thereafter, to carry out the purposes of this subchapter.

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